

DATE OF ISSUANCE: FEBRUARY 8, 1999

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In the Matter of)	
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MR. DELBERT LYNN COX &)	
MRS. LINDA JAYNE COX,)	
Complainants)	CASE NO. 1997-ERA-0017
)	
)	
v.)	
)	
LOCKHEED MARTIN ENERGY SYSTEMS, INC.;)	
LOCKHEED MARTIN CORPORATION, et al.)	
Respondents)	
)	
)	
_____)	

APPEARANCES:

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BEFORE: JAMES W. KERR, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER DISMISSING THE COMPLAINT

This proceeding arises under the Energy Reorganization Act of 1974("ERA"), 42 U.S.C. § 5851 (1988 and Supp. IV 1992) and the regulations promulgated thereunder at 29 C.F.R. Part 24 which are employee protective provisions of the ERA or of the Atomic Energy Act of 1954 as amended, 42 U.S.C. § 2011, *et seq.* The Secretary of Labor is empowered to investigate and determine "whistleblower" complaints filed by employees at facilities licensed by the Nuclear Regulatory Commission ("NRC") who are allegedly discharged or otherwise discriminated against with regard to their terms and conditions of employment for taking any action relating to the fulfillment of safety or other requirements established by the NRC. This claim is brought by Delbert L. Cox (Claimant 1) and Linda J. Cox (Claimant 2), Complainants against Lockheed Martin Energy Systems, Inc. and Lockheed Martin Corporation, Respondents. A hearing was held in Knoxville, Tennessee December 1, 1997 through December 5, 1997 and January 5, 1998 through January 9, 1998. Both parties were afforded a full opportunity to adduce testimony, offer evidence and submit post-hearing briefs. The following exhibits were received into evidence:

1) Complainant's Exhibits Nos. 1, 3, 5, 7, 10, 14, 17, 19-24, 27-B, 28-30, 31-A, 31-B, 32-A, 32-B, 33, 35, 36, 38, 39, 41, 45, 47-50, 52, 53, 57, 58, 60, 65, 73, 75, 76, 79, 81-84, 89, 104-107, 110, 111, 114-117, 119-122, 123-A, 123-B, 124-126, 127-A, 127-B, 127-C, 128-130, 133-A, 133-B, 134-136, 138-140, 142, 145, 147-155, 160, 161, 163, 167-169, 170, 172, 173, 174-A, 174-B, 175-A, 175-B, 176- 181, 184, 185-187, 190, 192, 218, 219, 220-A, 220-B, 222, 223, 226, 228, 231, 236, 239-242-A, 242-B, 243, 246-249, 252-254, 257-A, 257-B, 259-266.

2) Respondent's Exhibits Nos. 1-5, 8-10, 13-15, 17, 17(b), 18, 20, 21(under seal), 27-29, 30-

A, 30-B, 30-C, 30-D, 32-A, 32-B, 33-37.¹

Issues

The issues in this proceeding are:

1. Whether Complainants engaged in activities subject to protection under the ERA or the environmental statutes;
2. Whether Respondent's managers who participated in the decisions that eliminated the positions held by Complainants knew about their alleged protected activity at the time the decisions were made; and
3. Whether any personnel decisions by Energy Systems were motivated by Complainants' protected activity.

Summary of the Evidence

Testimonial Evidence

Donald Martin West

Donald West testified that he was a member of the Oak Ridge National Laboratory K-25 Guard Force employed by Lockheed Martin Energy Systems (LMES). Mr. West stated that he was present at a conversation in August 1996 involving Sam Thompson, Chief of the K-25 Guard Force, and Mr. Cox in which Mr. Cox's job tenure was discussed. Mr. West testified that when Mr. Cox stated that he should omit taking a vacation because his job might not be there when he returned, Mr. Thompson said that he need not worry about that because his job was safe. Mr. West admitted that he was not recalling verbatim Mr. Thompson's statement. Mr. West also admitted that if Mr. Thompson testified that he had said that he "believed" that Mr. Cox didn't have anything to worry about that he would not disagree with the use of the word believed.² TR 158-164.

Annie Lynn Walzer

¹ The following abbreviations will be used in citations to the record: CX - Complainant's Exhibit, EX - Employer's Exhibit, and TR - Transcript of Proceedings .

² Mr. West testified that Lockheed Martin Energy Systems was not reimbursing him for the time that he took off from work to testify for the Complainants in this case. Mr. West stated that he felt that if he were testifying for the Respondent he would have been reimbursed. TR 160, 161.

Annie Walzer, a toxicologist with a master's degree, testified that she was employed by LMES primarily at the K-25 site, for 6 years beginning in 1991.³ Ms. Walzer stated that her office was located in the administration building which was built during World War II. Ms. Walzer testified that her health was excellent when she was hired by Lockheed Martin, but that she has experienced a variety of ailments beginning in 1993. These ailments included sinus surgery, loss of pulmonary function, cardiac problems, and neurological problems. Ms. Walzer added that many of her co-workers were having health problems, particularly sinus problems. Ms. Walzer stated that in early 1995 thiocyanate tests of her hair and urine showed elevated levels of toxic substances which were present at the K-25 site. TR 183-185, 187, 188.

In April of 1995, Ms. Walzer had a sinus operation and was on disability for a month. Ms. Walzer opined that her problems were caused by toxins in the workplace and filed a medical incident report in May of 1995⁴. Ms. Walzer admitted that although she did not work in the office for the next few months, the company provided her with a laptop computer for working at home. Ms. Walzer admitted that she was relocated from the K-25 site to Scarboro Road from August of 1995 to September of 1996 after she requested to be moved and Industrial Safety concurred. Ms. Walzer added that she thought that her exposure to the huge amounts of nitric acid released into the atmosphere at the Y-12 plant caused her additional harm.⁵ Ms. Walzer admitted that Drs. Bryd and Lockey from the John Snow Institute of Environmental (Medicine) were brought in to LMES to evaluate the employees claiming toxin related health problems under direction of D.O.E. Ms. Walzer also admitted that employees suggested that Dr. Byrd be the one to conduct the examinations. TR 228, 230, 232, 242, 243, 254.

Ms. Walzer testified that she apprised Mike Mitchell, her former Division Director and Acting Vice-President of Compliance Evaluation Policy and the Environment Safety & Health, of her concern that work-place toxins were causing health problems. Ms. Walzer stated that Mr. Mitchell told her that if D.O.E. was informed that something at K-25 that was making people sick, they would lock the doors and everyone would go home. TR 193, 194.

In addition, Ms. Walzer testified that Conrad Stair, a manager in the Environmental Compliance Department came to her "out of the blue" at a meeting and said if you are going to continue to work in this organization, you are going to have to learn how to get tough. Ms. Walzer related that when she requested to be moved offsite, Mr. Mitchell and Mr. Stair stated that they would let her, but that she would have to return later to see if she became ill again. Ms. Walzer testified that when she did go offsite initially the company would not let her have her files or her

³Ms. Walzer testified that when she was hired by LMES she was not told that K-25 was a superfund site. TR 254.

⁴Ms. Walzer testified that she and others with health problems they thought were workplace related had difficulty in filing Medical Incident Reports. TR 201, 101.

⁵Ms. Walzer stated that the fact of the released came from findings of the Emergency Planning Community Right to Know Act. TR 230.

computer. Later, Ms. Walzer was allowed to have a computer and a telephone, but she still was not allowed to have the “things out of her office.” Ms. Walzer stated that eventually she was told to come get her things which were thrown in a box. Ms. Walzer also testified that once she went offsite she was treated as if she “wasn’t part of the group.” She related that her supervisor, Terry Cothran, would not allow her to participate in departmental meetings by speakerphone from her new location. Ms. Walzer admitted that had been close friends with Mr. Cothran prior to her request for transfer, but that since her request their relationship was somewhat strained. TR 196-200, 245, 246.

Ms. Walzer testified that she was head of the research committee of the cyanide working group that was set up for the company by Harold Conner, Site Manager. Ms. Walzer stated that it was either Mr. Conner or Fred Mynatt, the Vice-President, who had her prepare a memoranda on the subject of cyanide in the workplace and then provide comments on management’s response to the memo. The memo included a discussion of biological sampling for testing for toxins which, Ms. Walzer testified, were never carried out. Ms. Walzer admitted that a National Institute of Occupational Safety and Health (NIOSH) study found no hydrogen cyanide and cyanide particulates in the samples from the K-25 site. Ms. Walzer testified that the NIOSH investigators never took biological samples from workers. TR 205-208, 233-235, 258, 259.

Ms. Walzer testified that a number of LMES employees founded a group called “The Exposed”⁶ (of which Mrs. Cox was a member) which sent a letter to the Tennessee Governor Don Sundquist explaining their concerns.⁷ Ms. Walzer stated that when she originally voiced her concerns to LMES she felt that they would be taken seriously, but now feels that the company is not interested in health and safety but only in their own liability. Ms. Walzer testified that after The Exposed voiced their concerns, she received a termination notice even though she had seniority over several people who were not terminated and had won numerous superior performance awards. Ms. Walzer added that no other employees in her division were involved with The Exposed. TR 209-211, 215-217.

Ms. Walzer admitted that after she received the termination notice in January of 1996, her layoff was delayed until August 1996 and then delayed again. Ms. Walzer admitted that she had been offered a job at K-25 outside the Compliance Organization where she was working when she received the termination notice. Ms. Walzer stated that she did decline the position. Ms. Walzer also admitted that she was offered a position at the Portsmouth facility but declined because she had heard that person there had sexually harassed women and that she did “not want to be put in that situation.” Ms. Walzer also admitted that Cleve Jones, Director of Human Resources for K-25, helped find her a position at Hazrap, a company that developed pollution prevention programs, in Oliver Springs a community located 5-7 miles from K-25. Ms. Walzer stated that she only worked for the company briefly before she returned to short term disability. Ms. Walzer stated that she had went on short term disability status in September of 1997, but her long term disability is on appeal

⁶The group The Exposed later became known as The Coalition for a Healthy Environment.

⁷Ms. Walzer testified that she first met Mrs. Cox in the Spring of 1996 at a meeting to address toxin related health issues. TR 203.

and she is, therefore, still considered an unpaid LMES employee. TR 231, 232, 237-241, 252.

Ms. Walzer opined that Respondent was retaliatory in the manner in which it dealt with employees' public expressions of dissatisfaction with LMES's handling of toxin related health problems. Ms. Walzer added that she believed that LMES wanted their employees to be scared and fear for their jobs. TR 225, 226.

Ms. Walzer stated that she did not work directly with the Coxes, but that she did participate in activities with them that were public and, shortly thereafter, they both received layoff notices. Ms. Walzer opined that the layoffs of the Coxes were retaliatory in nature. TR 226.

Commander Harry L. Williams

Commander Harry Williams, a Section Commander at LMES, testified that he was Mr. Cox's supervisor when he began employment at K-25 in 1992. Cmdr. Williams stated that Mr. Cox had risen from a Security Police Officer to Training Captain where he was second-in command. Cmdr. Williams stated that Mr. Cox was a good leader and a natural at police security activity. He added that for the two years he had Mr. Cox under his supervision, he gave him two Consistently Exceeds performance rating. Cmdr. Williams testified that he was instructed by Chief Sam Thompson to reduce Mr. Cox's rating to a three. Cmdr. Williams explained that there was a quota system for ratings. Cmdr. Williams stated that the final rating given Mr. Cox was a three. This determination was made by a group of four including himself, Chief Thompson, Peter White and C.H. Peterson, but Mr. White was probably the one who made the final determination. Cmdr. Williams testified that he felt that the rating system at LMES, which was in place for the twenty years that he was employed there, was not truly a performance rating because it was not based on work and achievement for the particular reporting period. Cmdr. Williams stated that he would rate Mr. Cox at the top of his RIF peer group and would rate his skills as highly transferable. Cmdr. Williams admitted that the only other members of Mr. Cox's peer group that he had supervised were Mr. Cody and Mr. Dowdell. TR 274-278, 284-286, 288, 289, 335, 386.

Based on a review of exhibits presented to him during the hearing, Cmdr. Williams opined that, although he had only been involved informally in selection of employees targeted for previous RIFs, he felt that Mr. Cox was positioned for the RIF. He testified that Mr. Cox was disliked by both Mr. White and Mr. Peterson, members of the RIF selection committee. Cmdr. Williams stated that Mr. White disliked Mr. Cox because he was somewhat disabled and that Mr. Peterson's dislike for Mr. Cox was personal and not based on Mr. Cox's competence. Cmdr. Williams stated that Mr. White also disliked Mr. Cox because he "couldn't mind his own business" and "he got around and got involved in everything." Cmdr. Williams testified that both Mr. Peterson's and Mr. White's dislike for Mr. Cox was apparent before the initial meeting of the environmental concerns group. TR 328-330, 332, CX 127-130.

Cmdr. Williams testified that he and Mr. Thompson discussed the fact that length of service was no longer a standard for retention. Cmdr. Williams explained that the RIF process first looked at job position and time of service in that position without using total company service as a

parameter which could result in those with longer company service being released while those with less were retained. Cmdr. Williams admitted that his conversation with Mr. Thompson did not pertain specifically to Mr. Cox. Cmdr. Williams stated that he felt it unfair that the company would base retention on the time in a particular position when functionally the individual had exercised the same skills and responsibilities in prior positions which, therefore, should have been included in the individual's tenure. Under these standards, on the layoff comparison form Mr. Cox was only credited with 3 years of company service as a captain when he actually had been a captain longer. Cmdr. Williams admitted that he did not know that Mr. Cox had been considered for layoff in 1994 and had been saved by another individual taking early retirement. Cmdr. Williams also admitted that he did not know whether eligibility for retirement was a factor in the layoff decisions for others in Mr. Cox's peer group. TR 336-342, 388-390, 396.

Cmdr. Williams testified that in 1994 or 1995, before centralization took place, Mr. Peterson was at the top, then Mr. White under him. Cmdr. Williams added that Mr. Clements, who did not indicate his opinion of Mr. Cox, was then in a separate organization at Y-12. TR 333, 334.

Cmdr. Williams testified that Mr. Peterson knew of the Coxes' activity in the environmental groups because of media coverage and the presence of active Martin Marietta managers at a meeting in late 1995 or early 1996. Cmdr. Williams stated that this information would have become common knowledge because several high ranking managers were present and the meeting was very controversial. TR 330, 331.

Cmdr. Williams testified that Scottie Dowdell, a member of Mr. Cox's peer group for evaluation related to the RIF, was also under his supervision. Cmdr. Williams stated that he gave Mr. Dowdell a 3, Consistently Meets rating. Cmdr. Williams testified that at one point Chief Thompson had ordered him to replace Mr. Dowdell as he had lost his security clearance for allegedly stealing company property. Cmdr. Williams admitted that Mr. Dowdell's clearance was eventually restored and that during his suspension he worked directly for Chief Thompson. Cmdr. Williams stated that in his opinion Chief Sam Thompson was Mr. Dowdell's mentor. TR 283, 290, 388, 403.

Cmdr. Williams testified that he became involved with The Exposed because he was having serious health problems, and he and others with similar problems were having trouble getting the company to address these issues individually. Cmdr. Williams stated that he did not know that K-25 was a Superfund site until the group meetings in 1995. He testified that hazardous materials were poorly maintained in buildings K-25, K-27, K-29, K-31, and K-33. Cmdr. Williams admitted that when he addressed his environmental health and safety issues with Chief Thompson he was not unsympathetic, but his attitude reflected a desire not to rock the boat. TR 291, 293, 297, 301, 303, 304.

Cmdr. Williams testified that he was disciplined by Mr. Thompson, Mr. White and Mr. Peterson for going outside the chain of command. Cmdr. Williams stated that after Mr. Cox became involved in "this environmental situation", he was "jerked around on job positions" moving from K-25 to Y-10 or Y-12 and then back to K-25. TR 345-348.

Cmdr. Williams testified that he observed members of management of Lockheed Martin, Mr. Mynatt Executive Vice-President and Mr. Chizaminsky, at public meetings on environmental, safety and health matters in Oak Ridge. Cmdr. Williams stated that he specifically remembers a legislative hearing⁸ held in March of 1996 where the Coxes were slated to testify but yielded their time to him. Cmdr. Williams added that he observed Mr. Mynatt “make negative eye contact” with employees who testified against the company. Cmdr. Williams admitted that the hearings where he observed Mr. Mynatt were held in 1997. TR 348-352, 354.

Cmdr. Williams testified that he felt that Mr. Cox could have been given the position of a dispatcher that was open when he was dismissed. Cmdr. Williams did admit that he did not know whether that job had been bid or not, was not aware how long the job had been posted or when the job was awarded. Cmdr. Williams stated that even if one could not bid on a job, he could ask to be considered for the position. TR 403, 406-408.

Cmdr. Williams testified that his ability to serve as a security police person came into question due to his inability to meet medical standards when he came back to work after recovering from a heart attack. Cmdr. Williams stated that Mr. White attempted to transfer him to 1420, a decontamination facility at K-25, whereupon he filed a complaint with the site EEO office because he knew of other individuals working in security police at other sites who had similar conditions. Cmdr. Williams testified that the document prepared by Mr. White to answer the ensuing investigation by Gail Sewell was prepared solely for his case as there were no policies or procedures for filling out the form.⁹ Cmdr. Williams stated that both the conversation and the paperwork for a medical waiver was initiated by management. Cmdr. Williams testified that a medical waiver was never applied for because the company did not feel that it was in the company’s or in his best interest to do so.¹⁰ Cmdr. Williams added that after he opposed his transfer the company “just backed off the whole thing and it just all went away.” Cmdr. Williams stated that he was not advised that he could request a waiver himself. Cmdr. Williams admitted that Mr. White left it up to Cmdr. Williams’ private physician to make a recommendation as to whether or not he could meet the physical fitness requirements of his position. He also admitted that his physician felt that certain elements of the requirements could be potentially injurious to him and therefore he did not pursue becoming an armed officer. Cmdr. Williams stated that he was not aware that Mr. White included in his report that he was awaiting the results of an appointment by Cmdr. Williams with his physician to decide whether to seek a waiver. Cmdr. Williams conceded that this incident took place in 1990 and he remained in the protective services until 1996. Cmdr. Williams acknowledged that he was not aware that waivers for heart problems were different from other types of waivers.

⁸The legislative committee was appointed initially by the Governor to evaluate the incinerator at K-25 for the possible release of environmental toxins and was expanded into the operation of the K-25 site itself. TR 351.

⁹ Gail Sewell was an employee of the site EEO office. TR 2251.

¹⁰Cmdr. Williams testified that this statement was made in the document accompanying Ms. Sewell’s report. TR 2253.

Cmdr. Williams testified that to the best of his knowledge a waiver was requested for another employee, Gary Williams, by the company without the employee initiating it. TR 2250-2253, 2257, 2259-2262, 2265, 2266. CX 260, 261.

Cmdr. Williams testified that a procedure writer has to be certified by LMES and DOE. Cmdr. Williams stated that in his opinion the procedures supervise the intent of the DOE orders by structuring the directive into task elements for the job to be performed. Cmdr. Williams explained that jobs are defined around the outcome to be achieved with the operational elements. Cmdr. Williams stated that management has the absolute right to create jobs as they see fit as long as they can be funded. Cmdr. Williams testified that he has witnessed the creation of many jobs including his own when he would not accept a transfer to chemical operations. He added that he did not have to bid for the job of procedure writer, it was created for him. Cmdr. Williams testified that he was aware of several individuals that did not have to bid for jobs. TR 2998-3001.

Sandra Locke Reid

Sandra Locke Reid, a registered nurse, testified that she came to Oak Ridge because her physician husband was hired by Methodist Medical Center (MMC). Ms. Reid stated that the majority of MMC's income came from Lockheed Martin as it self insured and provided all the medical coverage for their employees. Ms. Reid also noted that there were Lockheed Martin managers on the hospital board. Ms. Reid testified that she and her husband left Oak Ridge because the hospital owned the clinic in which he worked and it did not renew his contract. TR 411, 412, 414, 416, 419.

Ms. Reid testified that her involvement in environmental issues in Oak Ridge began with her concern that her children were exposed to mercury at school. Ms. Reid stated that she served on the Advisory Board to the East Fork Poplar Creek Working Group that was looking at the release of mercury that affected the area. Ms. Reid testified that her concern grew when she saw poorly identified health concerns relative to the exposure to toxic substances and realized that there were no health care professionals involved in actually addressing these issues. Ms. Reid stated that she had also served on the steering committee of the Site Specific Advisory Board (SSAB) whose function was to advise the Department of Energy (DOE) on its policies and environmental management issues and to review the concerns of workers at the K-25 site to decide whether a specific concern would be addressed to the D.O.E. Ms. Reid testified that she also became a member of Citizens for a Healthy Environment (CHE), an organization whose mission is to educate the public about the effects of pollution, provide support for community members who are ill, and to provide support for whistleblowers in the community. Ms. Reid stated that the Coxes were founding members of CHE. TR 419-422.

Ms. Reid testified that she originally met the Coxes when she was asked to serve on the Site Specific Advisory Board (SSAB), a group of employees set up by LMES to address the concerns of affected employees. She stated that one of the leaders of the SSAB, Mr. Harold Conner, gave her permission to participate in the meetings. Ms. Reid testified that Mr. Conner attended "quite

a few” of the working group’s meetings, the majority of which were meetings of the Research Committee. She stated that there were approximately 15 meetings of the working group which took place during the spring and summer prior to the August 1996 meeting which included LMES employees and officials. Ms. Reid testified that these meetings took place before the Coxes were laid off. However, Ms. Reid testified that this working group’s recommendations were ignored and this led to the formation of CHE, made up primarily of K-25 employees.¹¹ She stated that Mr. Conner admitted that the system LMES had in place, which included the reporting of incidents and medical incident reports, had not worked and the employee’s concerns had not gone through proper channels. TR 423-424, 464-471.

Ms. Reid testified that at one of the meetings of SSBA at Scarboro Road David Milan, of LMES, was “taunting” and “dismissive of the worker’s concerns” with regard to the company testing that was done. She stated that after this meeting she called Mr. Conner and told him that she felt that one of the current problems was the way the workers were treated and the appearance of hostility and lack of communication. Ms. Reid also testified that there was public hostility toward herself and the employees of LMES because some people feared that the efforts of the CHE would ultimately cause the LMES facilities to close. TR 426-429.

Ms. Reid testified that at a public meeting covered by the local media in Oak Ridge the Coxes were “leading the community”. She stated that she could not remember the date of this meeting, but knew that it was the first CHE meeting and that it was prior to the Complainants’ termination. Ms. Reid added that the Coxes spoke at many public meetings of SSAB and CHE because Mr. Cox was the timekeeper for CHE and Mrs. Cox was treasurer. Ms. Reid admitted that a meeting of LMES employees to discuss the K-25 site, held at her house in late 1995, was covered in the local paper but did not mention the Coxes’ names. A week after this meeting the employees went to the SSAB meeting. Later, Mr. Conner came to do a presentation to the East Fork Poplar Creek Working Group. Ms. Reid admitted that the public meeting, which was the focus of a newspaper article, took place on August 15, 1996. Ms. Reid admitted that the Coxes were not mentioned in the August 14 article on the upcoming meeting. TR 435-438, 453-457.

J.D. Hunter

J.D. Hunter testified that he was hired by LMES in 1973 as a Security Inspector, shortly thereafter was promoted to Lieutenant, and eventually became a Commander in the Fire and Guard Service. Mr. Hunter testified that he filed a safety complaint in 1994 concerning a lack of proper equipment. He stated that ultimately it was supervisors from his division who investigated the complaint. Mr. Hunter testified that he supervised Mr. Cox for several years and found him to be

¹¹Ms. Reid testified that the group recommended that K-25 workers be adequately informed of avenues available to address their concerns. In addition, the group recommended that blood and urine samples be taken on a Monday and Friday to measure the presence of toxins and recommended that certain sampling methods be instigated.

ethical and hard working, and had never heard any complaints involving Mr. Cox. He admitted that he had supervised Mr. Cox prior to 1980. TR 472, 474-478, 480, 487.

Mr. Hunter testified that LMES was “notorious” for moving people around when there were to be RIFS. Mr. Hunter stated that, for instance, Pete Peterson would inform John Roddy or relevant personnel in other divisions to put people in certain positions. Mr. Hunter testified that while Mr. Peterson was Division Manager over his group, Chris Elliott was moved from a Shift Commander to the Fire Protection Group (a lateral transfer). Mr. Hunter stated that he also knew of training officers who were reassigned prior to layoffs. He testified that several years ago lieutenants, who were salaried employees, were allowed to go back to hourly employees when there were layoffs. Mr. Hunter admitted that the last time that this was allowed was in the 1960's. TR 480-484, 490.

Mr. Hunter testified that he attended a public meeting in 1996 at the Oak Ridge Civic Center where the Coxes were co-chairs. Mr. Hunter admitted that he did not remember specifically any questions addressed by the Coxes at that meeting. TR 484, 490, 491.

Cleveland Jones

Cleveland Jones, Director of Human Resources for K-25, testified that he has been in Human Resource work for 30 years and had come to Oak Ridge in March of 1990 as manager of Labor Relations. He was promoted to his present position in January 1, 1995. He added that he had been employed by Goodyear Atomic Corporation and at other LMES facilities before coming to Oak Ridge. TR 578, 579.

Mr. Jones testified that the budget reduction for the Business Unit of LMES necessitated the 46 or 47 lay offs from Mr. Dalton's maintenance department.¹² Mr. Jones stated that the Vice President of the organization allocated the budget reductions across different organizations. Mr. Jones explained that, because individual units provided work for other units, when the budget was cut provider organizations would inform receivers what services would be budgeted and the receiving units would then determine how to meet their budgets based on the expected income. TR 580-582.

Mr. Jones stated that Mr. Dalton reported to Mr. Conner, who was then the Site Manager.¹³ The operations unit, the business organization, and fringe areas which reported to Mr. Conner were all involved in the reduction in force because of budget reductions. Mr. Jones stated that he was previously Chairman of the RIF Review Board in other divisions and had also been involved in reductions in January, March, and April of 1996. He testified that he and Mr. Dalton undertook to administer faithfully the applicable RIF guidelines. Mr. Jones stated that anyone eligible for retirement was not included in the August 1996 RIF because of legal concerns of DOE and

¹²Mr. Dalton was the manager of the maintenance division. TR 580.

¹³ Mr. Conner is currently the Vice President of the Business Unit. TR 581.

Lockheed Martin. Mr. Jones testified that there were 4,000 employees at K-25 in 1990 and only 1500 today. TR 589-591, 494.

Mr. Jones testified that he was involved in the peer review of Mrs. Cox with Mr. Dalton, Herstine Every, a generalist that worked on the case, Horace Moorman, from the staffing organization, and Mary Ellen Boyd from compensation. Mr. Jones stated that a meeting to review Mrs. Cox, and approximately 46 other employees, for possible layoff was held around August 6, 1996 in the Labor Relations Conference Room at K-25. Mr. Jones testified that at the time of Mrs. Cox's review he did not know that she was on disability leave. Mr. Jones explained that when a layoff notice is given, if the party is not at work he is called at home unless on long-term disability. Mr. Jones testified that the policy of LMES mandates that if a person is absent due to illness or short-term disability then that person is notified that their position no longer exists and that they will be laid off upon return to work. Mr. Jones stated that when Mrs. Cox returned to work they would look to see if there was anything that she would be qualified to do and if not she would be laid off. Mr. Jones testified that layoff notices were delayed due to the problem of those eligible to retire, but that the actual layoff notice was dated August 26. Mr. Jones testified that the usual practice was to have 60 days between the notice and actual layoff. Mr. Jones explained that if a person was sick on the date of a notice and returned 30 days later, then that person would be laid off at the designated time. TR 493, 494, 497-500, 503, 504, 599-601.

Mr. Jones testified that an employee would go on short-term disability funded by the company for 6 months while remaining on the payroll at full pay. If the employee is still unable to work after 6 months, then he automatically goes into long-term disability and is removed from the payroll until recovery, are no longer disabled, or reach 62.¹⁴ Mr. Jones stated that approval of transition from short-term to long-term disability can be based on submitted medical evidence, and the individual need not see a company doctor. Mr. Jones explained that if an employee was included in a RIF, it would not impact his long-term disability benefits. Mr. Jones added that when an employee is on short-term disability his clearance remains intact; but, if he is put on long-term disability his clearance is canceled by D.O.E. under their policy of canceling clearance once an employee is removed from the payroll. Mr. Jones testified that he did not know of any employee removed from the payroll while on short-term disability. TR 601-605, 2700-2702.

Mr. Jones testified that the other person in Mrs. Cox's peer group was Mr. Bolton and one would be laid off. Mr. Jones stated that the criteria used to determine who would be laid off were critical skills, length of service, performance reviews, and age. Mr. Jones explained that transferability of skills is used only when there are vacancies in the company which was not true at the time of Mrs. Cox's layoff. Mr. Jones testified that Mr. Bolton had received two distinguished service ratings in his old job and a consistently meets in his new position, whereas Mrs. Cox had received all consistently meets ratings. Mr. Jones admitted that there was a quota for the ratings with about thirty percent getting "consistently meets" ratings and five to ten percent getting "distinguished service" ratings. Mr. Jones testified that there were objective verifiable criteria for the ratings. Mr. Jones stated that if an individual had completed a particular assignment in an

¹⁴Long-term disability pay is 60% of salary and is paid by Metropolitan Life. TR 2701.

outstanding manner or if his performance was exemplary over an extended period then that employee's manager would give a distinguished service rating. TR 505-508, 605, 606.

Mr. Jones testified that he knew of one incident where Mrs. Cox reported a DPPR¹⁵ to Brenda Williams and Mr. Dalton which was brought to his attention. Mr. Jones explained that ultimately Mr. Dalton took care of the matter himself. Mr. Jones testified that he had never heard Mr. Dalton use any adjectives relative to Mrs. Cox, nor had he ever discussed any audits with Mr. Dalton. Mr. Jones testified that if two employees were doing the same amount and quality of work he would give them the same ratings, and if one had to be laid off he would go to the criteria previously stated. Mr. Jones denied that downsizing and RIFS would be used to get rid of the people they did not like first because there are disciplinary procedures in place to deal with such cases. Mr. Jones testified that once managers decide which positions are to be eliminated, it goes to the RIF review boards, then to the Vice President of Human Resources and a member of the legal staff. Mr. Jones stated that the RIF review board would always include himself and Mr. Moorman with the other members changing.¹⁶ Mr. Jones testified that LMES does not use the HAY plan relative to RIFing people, although it is used as part of the compensation system.¹⁷ Mr. Jones testified that to terminate an employee the Vice President of Human Resources would have to give approval, and then a member of the legal staff would review the decision to determine whether there was a proper basis for dismissing the employee. Mr. Jones stated that if he went directly to a company lawyer and the lawyer found no basis for dismissal, then he would go to the vice president and say that he was not going to seek dismissal for that reason. Mr. Jones testified that he did not remember which of the two company attorneys was involved in Mrs. Cox's case. TR 515-523.

Mr. Jones testified that if the findings of the peer review suspect some form of prejudice on the part of a manager, the Review Board evaluates the findings based on the criteria of that individual. Mr. Jones added that if the possibility of prejudice is missed by the review board, then it is usually caught by the Vice President of Human Resources or the lawyers. TR 524.

Mr. Jones testified that when Mr. Bolton and Mrs. Cox were compared in the peer review, the group looked at age, performance reviews, time in position, length of service with the company, and pay levels. Mr. Jones admitted that he did not know how many of Mrs. Cox's buildings were closed nor how many of Mr. Bolton's buildings were closed. Mr. Jones testified that the Vice President of Human Resources and a member of legal reviewed Mrs. Cox's RIF. Mr. Jones testified that the Review Board agreed by unanimous vote that Mr. Bolton should have been retained because his years of service and his time in position were longer, and his performance ratings were better. Mr. Jones admitted that some ratings get changed in the course of review because if all individuals are rated extremely high beyond what is permissible, then they must review the ratings and get them

¹⁵There is no explanation of the acronym DPPR in the record.

¹⁶Mr. Jones testified that the RIF Review Board began in the 1980's and was reviewed and revised in December of 1995. TR 522.

¹⁷No explanation of the HAY plan is included in the record.

“in line.” Mr. Jones admitted that some managers gave undeserved ratings. Mr. Jones stated that there were no notes relative to the RIF Review Board meeting because the Review form itself includes the reason the person was RIFed. Mr. Jones admitted that no outside consultants were used to review RIF decisions. Mr. Jones stated that LMES felt that the criteria used precluded the element of prejudice from impacting the RIF decisions. Mr. Jones admitted that the meeting to review 46 or 47 employees for RIFs took four hours. TR 526, 528-530, 555, 556, 558, 559.

Mr. Jones testified that when Mr. Dalton and the group prepared the peer review list they used the old form which did not allow for multiple signatures. He explained that because Mack Wilson requested that all participants in the RIF review board sign the peer review form, he had the members sign a blank copy of the new form and attach it to the copy used at the time of the review.¹⁸ Mr. Jones testified that the participants could raise any concerns about a particular individual and the group had to agree that the person identified for RIF was the appropriate employee. He stated that the document demonstrated that Mack Wilson and a representative of the legal department approved the RIF list August 9, 1996. TR 2698, 2699; CX/RX-19.

Mr. Jones testified that Mrs. Cox was promoted to the position of supervisor of the laundry, a salaried Level 02 position, on July 1, 1993. Then, on April 1, 1995, Mrs. Cox was promoted to Facility Operator Specialist, a Level 03 position. Mr. Jones testified that the work was contracted out after the facility was closed. The decision to contract out laundry was made in 1994. TR 597-599.

Mr. Jones testified that in early 1995 the position which Mrs. Cox held was eliminated, and, rather than laying her off, LMES transferred her to a building specialist's position. Mr. Jones stated that he did not know whether Mrs. Cox was asked if she wanted the new position or whether she had bid on it. Mr. Jones stated that because there were no bumping rights when the Coxes were RIFed they could not replace an inferior employee, but only could fill an available vacancy. Mr. Jones admitted that he did not know whether Mr. Bolton was working any overtime, but agreed that it would probably be less costly to the company to pay the remaining employee overtime than to retain the former employee with salary and company benefits.¹⁹ He testified that he was not involved in Mr. Cox's RIF. He stated that in his organization no one was aware that Mr. Cox was effected. He testified that he was unaware of the issue until Mrs. Cox brought it to the attention of management in a letter. Mr. Jones stated that when management asked him if Mr. Cox was laid off by Harold Conner, he did not know, but contacted Larry Pierce, Human Resource Director at the Y-12 site, to find out. Mr. Jones stated that Mack Wilson, Vice President of Human Resources for all three

¹⁸Mr. Wilson is vice president of human resources. TR 2698.

¹⁹Mr. Bolton was the other employee who had the same position as Mrs. Cox and was retained. TR 555.

plants, had requested background information relevant to the Coxes' lay off.²⁰ He stated that he presented a brief employment history and the peer review form of each of the Coxes' to Mr. Wilson. TR 533-535, 543-545, 548, 559-561.

Mr. Jones testified that he knew of at least one employee of LMES who was trying to create dissension concerning the health of other employees. He stated that he knew there had been articles in the *Knoxville News-Sentinel* and the *Oak Ridger* about this issue. Mr. Jones added that he had read some of the articles, but had not discussed them with other managers because he felt no need to do so as he was not "in the health end of it." TR 568-570.

Mr. Jones testified that he had not seen prejudice based on race, union membership, or the raising of environmental safety and health concerns during his seven years at K-25. Mr. Jones stated that he had not heard Eva Graves use racial epithets, nor call anyone a troublemaker. Mr. Jones testified that he could not recall having a conversation with Mrs. Cox about how Mrs. Graves was treating her. He testified that Ms. Graves like himself, was black. TR 510, 511, 527, 528, 545, 546, 606.

Mr. Jones testified that in January 1996 there were 1955 employees at K-25, and by January of 1997 that number was reduced to 1581. He added that the number of employees was reduced to 1108 by November of 1997. TR 2708, 2709; RX-34.

Mr. Jones testified that using data from current sign in sheets at K-25 and comparing that to the individuals who signed a request that NIOSH return to further study the site, he calculated that 4 of 35 employees signing the request were involuntarily reduced in force from the company. Mr. Jones stated that the date on the request for NIOSH to return was dated April 17, 1996. R 2711-2713, 2717; CX-173, RX-35.

Mr. Jones testified that originally 55 employees who identified themselves as having occupational cyanide exposure and illness filed medical incident reports. Mr. Jones stated that of those 55 employees, 15 individuals received RIF notices during the two-year period 1996-1997. Mr. Jones testified that only 11 employees, or 20% of those noticed, were ultimately laid off because four were on disability. He added that 27% of the K-25 population received RIF notices during the same time period and 21% were laid off. He stated that employees Janet Michel and Chris Elliott were on long-term disability similar to Ms. Cox and each received a RIF notice. TR 2718, 2719; CX-173, CX-223, CX-37.

Mr. Jones admitted that layoff data from the calendar year 1996-1997 demonstrated that 529 K-25 employees were noticed and only 416 were actually laid off. Mr. Jones stated that when the company realized that both Coxes were being laid off they still could not retain them as their positions that were being eliminated. He admitted that he did know of one case where the company abolished a position and then moved the employee over to another position without going through

²⁰Mr. Cox was laid off, however, due to the fact that Mrs. Cox was on long term disability the personnel action is considered an attempted lay off and a notice of layoff. TR 566.

the competitive bidding and the application process. Mr. Jones testified that he was not aware of such a situation occurring during the RIF of August 1997. He stated that in determining which positions were to be abolished, salaried employees were not treated any differently from hourly employees. Mr. Jones admitted that union employees with seniority may have bumping rights. TR 2746, 2751, 2752, 2754, 2755; RX-36.

Mr. Jones admitted that his office maintained documents on those employees who claim to have cyanide exposure and illness. Mr. Jones testified that at some point the legal office would be notified of the report of cyanide exposure and illness by an employee. Mr. Jones admitted that Mack Wilson and the legal department would review the proposed list for RIF as the last step before the notices were issued. Mr. Jones stated that review by the legal office was also the last step in Mrs. Cox's layoff. TR 2731, 2732.

Mr. Jones testified that if Mrs. Cox's condition improved so that she could return to work, she would be told of available positions. Mr. Jones stated that Mrs. Cox could then be employed if she met the qualifications after bidding on a position but she would not be given priority in hiring. Mr. Jones testified that he sometimes attended Harold Conner's morning meetings but could not recall being present when the cyanide issue was discussed. TR 2734, 2735, 2737.

Mr. Jones testified that an employee who had been terminated may take his RIF benefit and work elsewhere. Mr. Jones stated that the RIF notice advises the employee that he may seek employment opportunities within the DOE or may use the company's career center to research both internal and external job opportunities. TR 2774, 2775; RX-17.

Shelly Graham Farver

Shelly Farver, a radiological control technician functioning as a Division Training Officer, testified she has worked for LMES for 10 years. Ms. Farver stated that she first became aware that she was excreting high levels of thiocyanate, a metabolite of cyanide, after seeing her family physician, Dr. Thomas Rogers²¹. Ms. Farver stated that after other workers at K-25 were tested for cyanide, she researched and discovered that the symptoms of cyanide intoxication mimicked her own symptoms of extreme fatigue, depression, body aches, and muscle joint pain. She testified that her lab tests were done by Dr. Thomas Rogers and Dr. Robert Pret (an occupational physician), and Emory University in Atlanta. Ms. Farver testified that her tests showed she carried a number of heavy metals in her body. She added that every report dealing with cyanide was out of the permissible range, and that she had a positive blood cyanide that was extremely significant. Ms. Farver stated that, although it was standard operating procedure to have medical problems incorporated into one's LMES medical records, when she asked that the lab report be included in

²¹Dr. Rogers, a general practitioner, sent Ms. Farver to an occupational physician. Although Dr. Rogers had been her physician for about 7 years, he now refuses to see her as a patient. TR 615.

her records in the Site Medical Department, it was returned to her with the statement that the report could not be included. Ms. Farver testified that at the same time that she requested that the report be included in her records, her request to see Dr. Oesch was denied. She added that she was told that “Dr. Oesch was not to be treating or discussing cyanide intoxication on the job and that this was a sensitive and controversial issue.” Ms. Farver added that a 99 was written on her files which was explained to mean that “patient left without seeing physician.” Ms. Farver testified that she interpreted the nurse’s statements as connoting that she was trying to keep Ms. Farver out of trouble. Ms. Farver testified that because she did not like the “very unethical” approach being taken by the medical department at K-25, she reported the incident to Lockheed Martin Corporate Ethics. Ms. Farver stated that about a month later, when her complaint came back to Oak Ridge Ethics, Barbara Ashdown met with her and another employee and told them to take their medical records to Stan Roberts, a staff physician’s assistant. Ms. Farver testified that she had undergone 5 days of chelation therapy ordered by Dr. William Reid, a hematologist and oncologist experienced in heavy metal toxicity. Ms. Farver stated that she underwent the therapy, which was somewhat successful in removing heavy metals from her body, at home because her insurance would not approve hospitalization. Ms. Farver admitted that she could not recall whether or not Drs. Lockey and Byrd, who were brought in to examine employees by LMES, had told her of problems associated with chelation therapy. TR 608-616, 678, 679, 698.

Mr. Farver stated that she was a founding member of Coalition for a Healthy Environment (CHE) and that she had been visible in and around Oak Ridge and Nashville speaking about toxic exposure to workers.²² She stated that she felt that she had been retaliated against by LMES after she filed an Employee Concern Form asking to be moved from the K-25. Ms. Farver stated that when she requested immediate removal management used the entire 6 weeks allowed by procedure before they responding, she considered it retaliatory.²³ Ms. Farver added that she had voiced her concerns all the way to Gordon Fee, President of Lockheed Martin Energy Systems, and was not moved until she sent an e-mail to him explaining what she perceived to be happening to her body, the permanent demyelination of nerve cells, was irreversible. Mr. Farver stated that when she was moved the retaliation began in earnest as she was moved into an office on Mitchell Road for four months without a telephone or computer. Ms. Farver testified that when LMES lost office space at Mitchell Road, she was moved to Scarboro Road where she did have a telephone and computer but was isolated in a cubicle. Ms. Farver stated that she was given only one assignment in nine months, although she asked to “do whatever”. She stated that she found out she was being transferred to Y-12 when she received an e-mail from management at K-25. At Y-12, Ms. Farver stated that her Division Manager wanted her to apply for an upgrade from an L Clearance to a Q

²²Ms. Farver stated that she had been in newspapers, on television, and that she had testified before a Special Panel of the Tennessee State Legislature. TR 617.

²³Ms. Farver stated that she also asked for removal of another employee, Ann Orick, who was extremely ill at the time also. TR 617.

Clearance which she did not question as most employees in the division had a Q Clearance.²⁴ Ms. Farver testified that when she underwent a security interview at Department of Energy Federal Building she was left with the impression that unless she submitted to a psychiatric exam she would not be given the clearance. Ms. Farver admitted that she indicated in the interview that she had suicidal thoughts in 1997. She stated that she would not acquiesce to the release of her psychiatric records because she felt that they were “none of their business.” Ms. Farver testified that after an hour interview with Dr. Kenneth Carpenter and two series of computer exams she was diagnosed as having paranoid delusional disorder and, therefore, did not get the clearance. Ms. Farver stated that she also lost her L Clearance and, therefore, was not cleared at all.²⁵ Ms. Farver stated that on appeal her psychologist testified that he did not agree with the LMES psychiatrist.²⁶ Ms. Farver stated that retaliation was also evident in the removal of her computer access, without notification as to why, after her security clearance was pulled. Ms. Farver added that her department manager was given his Q Clearance when he returned after being institutionalized. Ms. Farver testified that she was taking medication for depression and had been under psychiatric care for about four years, but had no knowledge of any employee being required to undergo periodic independent examination. Ms. Farver stated that LMES did find a position for her at another location after her nine months at Mitchell Road and Scarboro Road. Ms. Farver explained that she has held the position of radiological control technician with RADCON Division since October of 1996. TR 616-623, 625-627, 629, 631, 674, 675, 706-709, 714.

Ms. Farver testified that she witnessed hostility toward Dr. Timothy Oesch from David Milan, a manager with LMES Health and Safety, when they were members of the Technical Working Group. Ms. Farver stated that Dr. Oesch wanted to speak to the physicians at Oak Ridge Hospital about cyanide intoxication because they were not trained in chemical toxicity and many of the employees were dealing with this issue. She stated that Mr. Milan instructed Dr. Oesch not to do so, even on his own time. Ms. Farver testified that on another occasion David Milan criticized a presentation put together by the Working Group for Lockheed Martin Senior Management, stating that certain words and sentences could not be used. She added that most of the managers from LMES manifested indifference to the problems of the employees. TR 631-633.

Ms. Farver testified that in working with CHE and the Cyanide Working Group she felt that the LMES managers had reason to know that Mr. and Mrs. Cox were speaking out regarding the issues of employees’ toxin related illnesses. Ms. Farver stated that Mrs. Cox was on local television the same day as Mr. Conner and Mr. Milan, K-25’s Site Manager. They all appeared on the same news segment, and the news crew was stationed at Portal 2 for all portions of the segment. Ms. Farver testified that as part of the The Exposed group Mrs. Cox made contacts, served as a phone

²⁴Ms. Farver stated that she had had a Q Clearance for a number of years which was downgraded because it was no longer necessary for the job at K-25. TR 622.

²⁵Ms. Farver stated that she had also discussed her revocation of clearance with Danny Rown, her immediate supervisor. TR 713.

²⁶The decision on her appeal had not been announced. TR 714.

tree person, and solicited donations. Ms. Farver testified that Mr. Cox was at a number of meetings to support Mrs. Cox and chaired (including acting as Master of Ceremonies) the first public meeting that the group held at the Oak Ridge Civic Center attended by 50-75 people. This meeting was advertised on the radio and in local newspapers. TR 633-636.

Ms. Farver testified that she spent several hours attending meetings of the Cyanide Working Group as a member of the Research Committee. Ms. Farver stated that she was instructed to attend the meetings by her supervisor. The meetings took place during the 9 months that she had no work assignments. Ms. Farver testified that she forwarded an e-mail to Mrs. Cox, sent to her by the K-25 shift superintendent, advising of the closeout meeting for the cyanide working group. Ms. Farver stated that she sent a correspondence to Harold Conner after the closeout meeting asking for a follow-up meeting to address the concerns of the cyanide working group on July 2, 1996. Ms. Farver added that she also e-mailed copies to Mrs. Cox, William Noe, and Cheri Westfall all of whom were laid off in the RIF of August 1996. Ms. Farver testified that she e-mailed her fellow working group members the information received in a telephone call from Mr. Conner because "the written word does not lie or forget and he had a real bad habit of picking up the phone and calling". Ms. Farver added that she felt that the possibility that Mr. Conner was going to meet with them would give them some hope. Ms. Farver stated that she copied the e-mail to LMES management Harold Conner, David Milan, Larry Perkins, and Mr. and Mrs. Cox. Ms. Farver testified that she e-mailed a plea for help to the head of Oak Ridge Ethics, Barbara Ashdown, with copies to Harold Conner, her plant manager; Gloria Mencer, the other Oak Ridge Ethics Officer; and Mr. and Mrs. Cox. Ms. Farver also identified an e-mail sent by Cheri Westfall, who was very active in cyanide concerns and was laid off at the same time as the Coxes, with copies to Fred Mynatt, David Milan, and both Coxes. Ms. Farver testified that she also e-mailed Mark Musolf, a Public Relations person for LMES, referencing a public statement he made that employees were not being retaliated against. Both Coxes were copied on this e-mail. Ms. Farver stated that she did compile a list of CHE members and many on the list were effected by the layoff. TR 654- 666; CX-84.

Ms. Farver testified that she had been examined by doctors, Lockey and Byrd, but had not received a report from them.²⁷ Ms. Farver stated that Drs. Lockey and Byrd did not take any biological samples from the employees. She added that her hair analysis done by NIOSH was indicative of toxins. Ms. Farver admitted that she was aware that the toxins revealed in the hair analysis were present in everyone in minute quantities, but added that she did not feel that her results were within the range of most humans. She testified that since she moved from K-25, her cyanide levels had dropped from extremely high to zero. Ms. Farver stated that she had lab reports with dates and levels indicating that she could not have been exposed to cyanide at home. Ms. Farver testified that her husband's lab tests were negative for cyanide exposure. TR 675, 679, 717-20.

Ms. Farver testified that the Cyanide Working Group (CWG) was established about April

²⁷Ms. Farver stated that she, Ms. Walzer, Ms. Orick and a number of employees working closely with the Coalition for a Healthy Environment were involved in the selection of Drs. Lockey and Byrd, but she could not recall the exact date although she felt it was in November of 1996. However, Ms. Farver did state that she met with them in March of 1997. TR 675, 676.

13, 1996 by Harold Conner the K-25 Site Manager. Ms. Farver stated that she, Ms. Orick, and Ms. Walzer were members of the group which was supposed to be a joint effort between management and employees to come to a consensus on how to deal with the cyanide issues. Ms. Farver testified that generally there were company representatives present at the committee meetings and ultimately the group met as a whole to finalize the employee's presentation to be given to management. Ms. Farver testified that she was not sure whether or not she and Mr. Conner ever discussed the company's belief that there was no basis for cyanide exposure, although she met with him twice before she left the K-25 site. She stated that she was aware that LMES undertook studies which indicated there was no cyanide exposure, but added that the employees disagreed with the findings. Ms. Farver testified that the employees called in NIOSH, in confidence, before the CWG was formed. Ms. Farver stated that when NIOSH was contacted, only a portion of the LMES sponsored tests had been completed and they indicated no cyanide. However, the conclusion that there was no basis for cyanide exposure based on the company's tests was reached prior to the NIOSH report being released. Ms. Farver admitted that she was fully aware of the company's findings prior to the release of the NIOSH report. Ms. Farver testified that NIOSH came in early 1996 and she signed releases so that the NIOSH nurse, Karen Worthington, would have access to her medical records. Ms. Farver stated that she did not feel that the NIOSH people were competent because they only "looked at a small part of the problem." Ms. Farver admitted that the NIOSH group found no basis for cyanide exposure at K-25, but stated that she disagreed with those findings. Ms. Farver stated that the closeout meeting for the CWG which included several people from management, affected employees, a DOE representative, and attorneys was held after the NIOSH report was released. Ms. Farver stated that the employees were very vocal in their dissatisfaction with the NIOSH findings because they felt that the sampling was too limited as it did not test for certain nitro compounds.²⁸ TR 681-690, 692-693, 698, 699, 720-722.

Ms. Farver testified that she was a founding member of The Exposed which came into existence in January 1996 and was composed primarily of affected workers. Ms. Farver admitted that the list of members was not published to the community, but was used internally. Ms. Farver admitted it was her position that it "was not statistically probable" for 7 out of 28 or 29 members of the group to have been laid off, particularly a husband and wife. Ms. Farver admitted that at the time of the Coxes' lay off there were 300 out of a pool of about 10,000 that were laid off. Ms. Farver admitted that she was not aware that 1,000 employees had left the K-25 payroll in the last year. TR 694-697.

Ms. Farver testified that she was absent a great deal due to her toxin related illnesses prior to going part-time in April 1, 1997. Ms. Farver stated that she first became aware that cyanide exposure was the cause of her illness in October 1995.²⁹ Ms. Farver admitted that she was directed by LMES to see Dr. Philip Edelman of Vanderbilt University's Toxicology Department and that his conclusion was somnolence, a term she did not understand. Ms. Farver admitted that he did not find

²⁸Ms. Farver testified that when nitro enters the human body it converts to cyanide and then metabolizes to thiocyanate. TR 722.

²⁹Ms. Farver stated that she had been ill for a number of years prior to 1995. TR 701.

that she was suffering from cyanide exposure. TR 700-704.

Ms. Farver testified that her husband was currently employed by Lockheed Martin. Ms. Farver explained that he had worked with the company for three years, left, and returned for the last two years. Ms. Farver stated that her husband would not be employed by Lockheed Martin after April 1, 1998 as he would then be employed by the new M&I contractor at K-25. TR 715, 716.

Ms. Farver testified that Senator Fred Thompson and the Tennessee State Health Department had recently asked the Center for Disease Control to look at the Oak Ridge health problems. Ms. Farver stated that there are ongoing studies concerning the health of the employees at all three LMES sites. TR 725-728.

Cheryll Ann Dyer

Ms. Dyer testified that she was a member of the group The Exposed (now known as Citizens for a Healthy Environment (CHE)) since February of 1996. Ms. Dyer stated that she attended a meeting of about 150 people at the Oak Ridge Public Library in August of 1996 where Mr. Cox served as Sargent-at-Arms and Mrs. Cox greeted attendees and handed out literature. Ms. Dyer testified tht Mrs. Cox had served as Treasurer of CHE, involved in the phone tree, and in keeping those within and outside the group informed of what is happening. TR 769-781.

Ms. Dyer testified that Lockheed Martin managers including Fred Mynatt, Harold Conner, and Dave Milan were present at several meetings sponsored by DOE. She added that she had observed Mr. Mynatt, in particular, get up and walk out or start shaking his head “like, oh, no, not again.” Ms. Dyer testified that she felt Mr. Mynatt was exhibiting disgust with what was being said by shaking his head. Ms. Dyer admitted that, at times, she also exhibited disgust at what was said in these meetings. TR 781, 782, 791-793.

Ms. Dyer testified that she had worked for LMES for eight years, the first two at X-10 and then at K-25 for the next six years, as a health physics technologist. She stated that she is currently on long-term disability although she remains on the Y-12 payroll. Ms. Dyer testified that in February 1996 when she filed a medical incident report containing lab results evidencing extremely elevated levels of thiocyanate and stated that there was something work-related affecting her health, medical staffer Stan Roberts told her that they did not think that was the case. Mr. Roberts told her that he thought her symptoms were stress related. She testified that Mark McKinney, head of safety and health at Y-12, told her that Industrial Hygiene had found no cyanide issues in her building. Ms. Dyer stated that she received a memo from Stan Roberts in March 1996 stating that she should report back to work and upon doing so should confer with Industrial Hygiene, Industrial Safety, and the medical director in K-12. Ms. Dyer testified that her doctors told her she could not return to work because she was physically incapable and also because there were unknown toxins that were affecting her health. Ms. Dyer stated that she was out on long-term disability with a diagnosis of chemical encephalopathy (chemical exposures), depression, and panic and anxiety disorder. Ms. Dyer admitted that she was out on a Worker’s Compensation claim based on what she felt was an occupational exposure. Ms. Dyer admitted that she was treated for depression related to family

problems in 1992 and 1996. She added that she began working at the plants in Oak Ridge in 1988. TR 772-776, 789-791, 795.

Ms. Dyer testified that, in 1993 or 1994, she requested material safety data sheets (MSDS) on a job that she was working on but the request was denied. She stated that the request was made to Keith Pierce, her immediate supervisor; Steve DuBose, his supervisor; and Al Lingerfeld the division supervisor. Ms. Dyer added that Mr. Lingerfeld stated that the document was classified and Charlie Satterwhite in Industrial Hygiene confirmed the opinion. TR 785-787.

Samuel Alonzo Thompson

Samuel Thompson, Guard Chief at K-25 since May 1981, testified that he discussed Mr. Cox's future employment at LMES with him in August of 1996 and told Mr. Cox that he was not going to be laid off. He stated that at that time LMES managers Brian Lamb and John Woods, not Harry Williams, were most aware of Mr. Cox's job performance. Chief Thompson testified that he did not decide to lay off Mr. Cox and was not aware of who made the decision. He was informed of Mr. Cox's layoff by Brenda Tilley, his supervisor and Sector Manager for Security Operations at K-25. Chief Thompson stated that he was told by Ms. Tilley that Peter White, Department Head of Security Operations for LMES, was coming over from Y-12 and that he was to be in his office with Mr. Cox. He testified that Mr. White, Ms. Tilley, himself, and Mr. Cox were at the meeting which was led by Mr. White. Chief Thompson admitted that although he had been involved in a "couple of dozen or more" layoff meetings, this was the first time that such a meeting was attended by three levels of management. He stated that after explaining the budget reductions, downsizing, and regrets that people were having to leave the payroll, Mr. White gave Mr. Cox a layoff notice. Chief Thompson testified that Mr. Cox, looking shocked and surprised, refused to sign the notice stating that it was not fair that he would be laid off. Chief Thompson stated that he was surprised at Mr. Cox's layoff as he had been told that Mr. Cox was going to be transferred into his department upon dissolution of the support group for which Mr. Cox worked. Chief Thompson testified that he had actually discussed with Mr. Cox what his duties would be on transfer. Chief Thompson stated that he felt Mr. Cox was a good employee and a team player. Chief Thompson admitted that he had never heard Mr. White nor Ms. Tilley say that Mr. Cox was a disloyal employee and added that he could not recall any manager above him ever saying anything as to whether Mr. Cox was a "team player." Chief Thompson testified that he did discuss the fact that both Coxes were being laid off, but did not discuss the "fairness" of the layoff. He stated that he had not formed an opinion as to whether it was appropriate to lay off Mr. Cox and that he did not know who was in Mr. Cox's peer group and, therefore, could not state whether anyone in that group would have been a better candidate for layoff than Mr. Cox. Chief Thompson testified that he could not make a determination as to who was a more appropriate candidate for layoff between Scottie Dowdell and Mr. Cox because he would have to look at the criteria relative to both before making such a determination and neither man "stood out" enough to make an "automatic" determination. TR 800-808, 818, 832, 833, 839, 843-845.

Chief Thompson testified that Mr. Cox had informed him that Mrs. Cox had medical tests done which prompted further investigation and added that he "may want to get checked". Chief

Thompson testified that he could not recall any particular chemical name that Mr. Cox might have indicated relative to Mrs. Cox's condition, but did admit that the prevalent work at the site was cyanide. Chief Thompson stated that he could not recall Mr. Cox mentioning any group that he and Mrs. Cox were involved in with respect to chemical issues. Chief Thompson stated that Mr. Cox never indicated directly that he felt Mrs. Cox was exposed to chemicals at K-25, but admitted that it was probably inferred in Mr. Cox's warning to him to get tested. He added that Mr. Cox's concerns for Mrs. Cox's health were legitimate good faith concerns that anyone would have for a family member. TR 809-810, 874.

Chief Thompson testified that he had not observed contamination at K-25 during his 30 year tenure. He admitted that there were housekeeping problems as a result of a deficient janitorial staff. He answered that he had never seen green salt on the floor at K-25, but had seen it in pipes that were disconnected while under repair. Chief Thompson testified that he had first encountered signs warning of contamination about 4 years ago, but had noticed radiological signs when he was first hired. Chief Thompson stated that he felt that the headquarters, shift superintendent's building, the cafeteria, medical, administrative buildings, engineering buildings, computer center and others were not contaminated because they were not posted as radiological areas. Chief Thompson testified that employees who work in radiological areas and those that go in and out of all of the site buildings, including guards, must wear dosimeters which are read in-house by Health Physics. He stated that there were evacuations about two or three times a year when the radiation or fire alarms go off. He added that there were "no fishing" signs posted on ponds at the site, but answered that he was not aware of signs at Poplar Creek or Watts Bar. He stated that he was not aware of evacuations as the result of releases of UF6. TR 811-813, 816-818, 828, 829.

Chief Thompson admitted that he had seen television and newspaper allegations of chemical exposures in Oak Ridge which were later referenced at the daily meeting with his staff. Chief Thompson stated that he did not recall opinions on these allegations being expressed as the meetings were used only to make direct reports. He testified that he had never heard the words "troublemaker" or "radical" used in reference to either of the Coxes, nor had he used such words relative to them. Chief Thompson stated that he had never felt that Mr. Cox was a radical or had gotten involved in anything unusual or was obsessed about anything. Chief Thompson admitted that he gave an interview to the security clearance investigator for the United States Office of Personnel Management, relative to Mr. Cox's Q clearance in the 1970's, but did not remember stating that "Mr. Cox is a very conscientious person, but a little radical" or stating "the subject is union oriented and sees things on the union side and not on the company side." Chief Thompson added that he had not been given the opportunity to review the notes of the investigator for accuracy. Chief Thompson testified that even if he used the term radical, or something that the investigator interpreted as such in the 1970's, he did not feel that Mr. Cox was radical, or idiosyncratic, or exhibited any unusual or extreme personality traits in the 1990's. Chief Thompson stated that he had never heard any manager or supervisor state that the Coxes were not good employees or any statements of that nature in reference to them. He added that when Mr. Cox was in training Harry Williams expressed often that he was a good employee. Chief Thompson stated that usually positive or negative comments relative to employees were event specific. Chief Thompson testified that he had never heard comments by managers or supervisors concerning K-25 employees who were either sick or thought

they were sick, although such concerns were common knowledge around the plant. Chief Thompson testified that recently, due to the publicity, employees have begun questioning the safety of the buildings they enter. These concerns have led to Health Physics personnel briefing security personnel in the guard mounts on the safety of the buildings they were entering.³⁰ Chief Thompson testified that Mr. Cox never stated to him, or otherwise gave him the impression, that he was someone who verbalized environmental, safety, or health concerns. Chief Thompson testified that he had not ever heard Mr. Cox quoted in the media complaining about the environment, K-25, or anything at the plant, although he had seen Harry Williams quoted in the newspaper. Chief Thompson stated that, as he recalled, the quote in the *Nashville Tennessean* was made after Mr. Williams was transferred to the range and after his leaving on disability. Chief Thompson testified that Mr. Williams was not regarded any differently in the Protective Services after the quote. Chief Thompson stated that he had never heard any supervisor or manager discuss the site being shut down for any reason, and that he could not recall security personnel raising concerns as to contamination prior to 1996. TR 819-827, 831, 835, 840, 852-855, 868-874, 876, 877.

Chief Thompson testified that although he was aware that employees believed that they were ill because of chemical exposure at the plant, he did not dwell on it. Chief Thompson stated that he had worked at the plant for 30 years, and his wife had worked at different sites for 12 and they were healthy, therefore, he felt safe working there. He stated that he was not aware of any discussion as to whether someone was safer from exposure to radiation at home or at work. TR 862.

Chief Thompson testified that he did not recall ever telling Mr. Williams that the company was only going to allow so many 2 and 3 ratings and, therefore, he would be limited in the ratings he could give. He admitted that it was possible that there was a company policy. Chief Thompson explained that he turns in his Personnel Performance Ratings (PPR) to his supervisor, who then turns them into Ms. Tilley, who forwards them to her supervisor, Mr. White. After review, Ms. Tilley may be told that she has to limit her twos or threes, whereupon she would limit each supervisor's twos or threes and they would then have to readjust their ratings accordingly. Chief Thompson testified that it was not unusual for an employee to receive a consistently exceeds rating three years in a row, but that Mr. Cox had not done so while under his supervision. TR 841-843, 847.

Chief Thompson testified that there is a chain of command at LMES, but that because all managers have an open door policy, it is not disfavored for an employee to go outside that chain. Chief Thompson stated that he had never gone outside the chain of command, but knew employees who had and was not aware of any retaliation against any employee for doing so. TR 849-851.

Thomas Larry Pierce

³⁰The guard mount is a briefing that takes place twice a day at shift changes between employees coming on and those going off shifts. Chief Thompson stated that a guard mount was not the occasion to criticize an employee and that he would not tolerate such use of the guard mount. TR 834.

Thomas Pierce, Human Resources Director at the LMES Y-12 plant, testified that he had reviewed the transcript of the taped conversation with Mr. Cox and it did reflect accurately the conversation he had at the September 4, 1996 meeting. He testified that Jim Bryson would have been in charge of human resources at Oak Ridge in September of 1996. Mr. Pierce stated that protected activity came under the aegis of the environmental whistleblower laws, not under affirmative action programs. He explained that in making layoff decisions management reviewed the salaried positions to determine if there was a disparate impact, or potential discrimination, with regard to protected categories of age, race, or gender, but did not consider disparate impact on those raising concerns about cyanide at the K-25 plant. Mr. Pierce testified that the primary determination for layoffs was made by the organizational manager of the particular organization where the reductions would take place, in Mr. Cox's case, Mr. Clements. Mr. Pierce explained that for determination of who would be laid off non-union employees are placed in peer groups based on actual work function, a determination is made as to necessary reductions, and then several factors are reviewed to determine who will actually be laid off. He testified that lieutenants and captains were not in the same peer group for layoff purposes because they are functionally distinct. Mr. Pierce stated that Mr. Cox was laid off because of monetary reductions that impacted the entire protective services organization and specifically his peer group, administrative support captains. Mr. Pierce admitted that he did not take any action after his September 4 meeting with Mr. Cox to find another position for him at LMES. He stated that the fact that a lieutenant was promoted just a month prior to Mr. Cox's layoff, to a position Mr. Cox felt he may have had, had nothing to do with Mr. Cox's reduction. Mr. Pierce stated that he advised Mr. Cox to avail himself of the career center to look at other job openings available at LMES. Mr. Pierce admitted that he did not use consultants or perform staffing studies to decide who to lay off, the decisions were made by in-house managers who know the organizations best. He added that an immediate supervisor would have an opinion about an unsatisfactory employee. TR 934, 936, 940-945, 948, 950.

Mr. Pierce testified that he did not learn of Mrs. Cox's concerns about contamination, pollution, and poisoning until the September 4, 1996 meeting where Mr. Cox informed him that Mrs. Cox had been ill. He testified that he had never seen Mrs. Cox on television. He admitted that he was aware of concern about cyanide at K-25, but did not remember when he learned of the concerns. Mr. Pierce stated that he had never had any discussions with managers in 1996 about cyanide issues in Oak Ridge, but had read general articles in the newspaper stating that workers were concerned that they may have been poisoned by operations in Oak Ridge. He testified that he had heard Harold Conner refer to the articles in the paper and was aware that he tried to find out what the problem was. Mr. Pierce testified that he never discussed NIOSH or cyanide with Mr. Conner, Mr. Bryson, Mr. Jones, or Mr. Clements. He added that although there were weekly meetings with other managers at LMES, he had no personal conversations about cyanide. TR 953-956.

Mr. Pierce testified that there was a chain of command at LMES, but it was not frowned upon to go outside the chain. Mr. Pierce stated that it was protected activity and, therefore, an individual could do so. Mr. Pierce testified that he did not know whether anyone had problems when the Coxes went to NIOSH. TR 957.

Mr. Pierce testified that he had a conversation with Cleve Jones about the Coxes' layoffs after they issued the layoff notices because the vice president had asked Mr. Jones to gather information about the layoffs. Mr. Pierce stated that he provided a brief summary of why Mr. Cox was selected for layoff, his job title, etc. He added that a vice president reviews all salaried layoffs as part of the process. Mr. Pierce stated that the vice president became involved after Mr. Cox's layoff because of an inquiry initiated when it was discovered that both Coxes were terminated. He added that he not aware whether any meetings actually took place regarding this issue. Mr. Pierce testified that to his knowledge no manager tried to "undo" the layoffs of the Coxes. He stated that he felt the layoffs were appropriate under the guidelines, and therefore did not do anything about them. Mr. Pierce testified that he had attended dozens of layoff meetings in his 25 years at LMES. He stated that a RIF review board is led by a human resources director, a manager and his subordinate managers, or administrative personnel. These individuals present to the board an explanation of the need for a reduction, a list of those to be reduced, and a review of the list for possible discrimination. Mr. Pierce testified that, if the reductions make good business sense, they are then approved by the entire board. Mr. Pierce stated that the board would know if a manager did not like any employee because the board knows the managers and would detect a hidden agenda. Mr. Pierce testified that if Butch Clements did not like people who criticized the company and decided to fire Mr. Cox because his wife was involved in such activity, it would be detected in the review by the vice-president. Mr. Pierce stated that he knew Mr. Clements and added that he is "not that kind of an individual." Mr. Pierce testified that he did not know how many members of the Coalition for a Healthy Environment or The Exposed Group were laid off. Mr. Pierce stated that he did not know how many workers who raised concerns about cyanide at K-25 were laid off. Mr. Pierce admitted that none of the prior layoff meetings he had attended had three levels of management present. He felt that the three levels were needed at Mr. Cox's layoff meeting to explain the reason for the reduction. Mr. Pierce testified that he did not recall the details of the meeting with Mr. Butch Clements regarding the layoffs, but did remember discussing the reductions themselves. Mr. Pierce testified that the review board had originally intended to lay off five administrative captains, but this number was reduced when it was decided that they would not lay off any individual who was pension-eligible under the retirement incentive program.³¹ Mr. Pierce testified that this same procedure was applied to the entire company. Mr. Pierce testified that all individuals in the protective service organization, other than the three selected for layoffs, were eligible under the incentive program. Mr. Pierce added that Mr. Cox would have been RIFed even if the decision had not been made to exclude those eligible for the incentive program. He stated that he was not involved in the determination of the numbers in each group that would have to be laid off. Mr. Pierce stated that budgetary information was given to the managers, including Fred Mynatt, Harold Conner, and Dave Milan and the senior managers then determined the number of individuals to be impacted as a result of budget reductions. Mr. Pierce testified that Mr. Clements justified his reductions to the RIF review board stating that, in line with the company's objectives, he was reducing his overhead areas. Administrative captains were considered overhead as they did not directly supervise a crew. TR 957-965, 982-987, 990, 991.

³¹Mr. Pierce admitted that this policy was not in writing, but was effected orally. The decision was made by the President and Vice-President of the company and the Vice-President of Human Resources. TR 990, 991.

Mr. Pierce testified that when he stated that he “didn’t know that your wife (Mrs. Cox) was involved in that kind of stuff,” he did not mean protected activity under the environmental whistleblower laws. He explained that when he talked about Linda being involved in “that kind of stuff,” he meant the fact of her illness. Mr. Pierce testified that he did not have knowledge that Mrs. Cox was one of those expressing concern about cyanide, nor did he know that Mrs. Cox was to be laid off, when he made the presentation to the RIF Review Board that included Mr. Cox. Mr. Pierce testified that he had no knowledge that Mr. Cox was involved in the cyanide group at that time. Mr. Pierce stated that he was not addressing the filing of a compensation claim because he was not aware that Mrs. Cox had filed one. Mr. Pierce testified that the layoff of the Coxes was determined by LMES; the Department of Energy (DOE) had no input into the LMES decision. Mr. Pierce stated that he was not aware of any approval by the DOE necessary for layoffs. Mr. Pierce testified that he had never attended any meetings with NIOSH. Mr. Pierce testified that he had never attended any meetings concerning The Exposed or the Coalition for a Healthy Environment. TR 965-969, 971-973, 987, 988.

Mr. Pierce acknowledged that there are many formalized policies, procedures, and guidelines as well as some informal policies at LMES. Mr. Pierce admitted that the formalized procedures, policies, and guidelines are usually numbered, but the layoff policy because it is produced as guidelines for the involuntary reduction force of salaried personnel does not go through the command media process to be numbered and appended to the policy. Mr. Pierce testified that the layoff policy was approved by the Vice President of Human Resources, Mack Wilson, and that Mr. Pierce instructed the managers to use it as the methodology to be applied. Mr. Pierce testified that the management could exercise some judgment in the determination of who is terminated. TR 978-980.

Mr. Pierce testified that it required at least an L clearance to gain entrance to the area in which his office is located, and employees are not authorized to bring in personal tape recorders. Mr. Pierce admitted that he did not remember the difference between a protected area and a controlled area. Mr. Pierce stated that there was currently a sign posted listing prohibited articles at the entrance to the facility, but admitted that he did not know if there was a sign posted on September 4, 1996. TR 981, 991, 992.

Willis L. Clements

Willis Clements, director of protective services for LMES in Oak Ridge, testified that he was responsible for management of the organization that provides security and fire protection for the three LMES sites. Mr. Clements testified that he could not speak for all managers in Oak Ridge security, but felt that it was a “necessary right” and “good safety valve” to allow people to go outside the chain of command to address grievances. TR 997, 1001, 1002.

Mr. Clements testified that Floyd Glenn is a hard-working security officer who had already been issued a decision making leave prior to an incident where he reported an environmental concern to the state without reporting it to the PSS. He stated that LMES wanted such incidents reported so that problems could be addressed before they escalated. Mr. Clements testified that the

concern with Mr. Glenn was not that he reported something to the state, but that he did not follow procedures in reporting the incident to PSS immediately. Mr. Clements stated that this incident, along with a sequence of incidents with other employees where Mr. Glenn was accused of being overly aggressive and abusive, led to the letter which was not a disciplinary action in itself but did include a one year probation. TR 1002, 1004, 1005.

Mr. Clements testified that John Woods had never expressed concern to him about David High's addressing the possibility of waste, fraud, and abuse in the physical fitness training programs and going around the chain of command to outside auditors to present these issues.³² Mr. Clements testified that Mr. Woods told him that Mr. High was going to raise the issues with the survey teams, but denied Mr. Woods ever used the terms "calculated and premeditated" to characterize Mr. High's actions. Mr. Clements stated that he never saw any evidence of anger directed toward Mr. High by Mr. Woods as a result of his going outside the chain of command. TR 1007-1011.

Mr. Clements testified that Mr. Cox was RIFed because of budget reductions which impacted the entire organization. Mr. Clements stated that this was the normal process used when there was not enough money to pay the salaries of those currently on the payroll. Mr. Clements testified that for the fiscal year 1997, K-25 had indicated a 25% reduction in budgetary income and reductions were made to have the least impact on service provided by LMES to their customers. Mr. Clements stated that protection of SNM in the security business is first priority, protection of classified material is second, and protection of other government interests and property is third. Mr. Clements testified that he translates the budget numbers into the decision as to who is to be eliminated. Mr. Clements testified that positions with administrative functions which do not directly support customers were reduced 50%. He stated that such positions included Mr. Cox's peer group of administrative captains. He explained that, in determining who is to be laid off, a list is made of all individuals in a peer group and then those individuals are compared based on the factors selected by LMES. These factors include performance appraisals over three years, time in the company and in the position, availability or the ability of the individual to do other functions that might be necessary. Mr. Clements testified that the employees are then ranked in the peer group from the ones who would be terminated first to those who would be terminated last, and the number of necessary reductions are then made based on the list. Mr. Clements testified that the budget reductions were determined as early as March with the original projection for layoffs to begin in December or January. Mr. Clements stated that he was notified layoffs would begin in August, and therefore in late July or early August the list of those to be laid off was solidified. Mr. Clements testified that he "signed off on the peer review sheet" somewhere around the 23rd of August. Mr. Clements stated that once he was satisfied that the order was proper, he then sat in front of a peer review panel that consisted of the Human Resources (HR) director for the defense program, Larry Pierce, another line manager representative, a representative from the Affirmative Action Office, and several others. Mr. Clements stated that at this review he explained his rationale for the projected layoffs. Mr. Clements testified that he then went before a second peer review panel consisting of the Senior Vice-President for Human Resources, Mack Wilson, legal representatives, and representatives from Affirmative Action and other HR groups where he again explained his

³²David High is manager of the physical training programs for the 3 sites. TR 1008.

rationale and the final decision was actually made. Mr. Clements testified that he could not recall whether questions were asked relative to Mr. Cox during the peer review sessions. Mr. Clements stated that although he had gone into peer review sessions feeling that he had selected the right individuals to receive layoff notices, discussions during a session could cause him to change his decision. Mr. Clements testified that he did not recall this occurring in the case of Mr. Cox. Mr. Clements stated that he felt the peer review sessions were very thorough. TR 1011-1017, 1054.

Mr. Clements testified that in 1994 captains and lieutenants were considered in the same peer group for layoffs because, at that time, there were lieutenants who performed administrative functions, but these lieutenants have since been eliminated. TR 1018.

Mr. Clements testified that Mr. Cox could not be armed because he could not meet the physical qualifications. He stated that a waiver can be sought from DOE for such a disability, but the request must be initiated by the individual. Mr. Clements admitted that there were unarmed supervisors, but did not know of any who directly supervised armed personnel. Mr. Clements testified that there were employees who were temporarily unarmed who supervised armed personnel because such individuals were not automatically reassigned depending on how long they were going to be disarmed. TR 1019, 1020, 1030-1033, 1053.

Mr. Clements testified that once he knew there was to be an involuntary reduction, every time there was a vacancy he filled it only if it was a function that had to be performed and he then advertised the job within the organization and encouraged people to apply for those jobs. Mr. Clements stated that once the RIF notices came out, there were very few opportunities for people to compete for jobs. TR 1021, 1022.

Mr. Clements testified that he did not know if Mr. Cox was on special detail to K-25, but did feel that Mr. Cox was needed at K-25. Mr. Clements testified that it was not an issue of needing Mr. Cox as they needed more people than they were authorized for or were funded to have. Mr. Clements stated that he did not know if Sam Thompson had a position in mind for Mr. Cox, and was not aware whether Mr. Thompson was surprised when Mr. Cox was RIFed. Mr. Clements stated that he did not know whether Brenda Tilley was surprised to learn that Mr. Cox was being RIFed but added that Ms. Tilley and Peter White made recommendations as to what administrative support functions were the most critical. Mr. Clements testified that Ms. Tilley knew that Mr. Cox was an administrative captain and that those positions were being reduced. TR 1022-1024.

Mr. Clements testified that he did not know that the Coxes had concerns about cyanide and other contaminants until after Mr. Cox received his layoff notice and requested to see him under the "open door policy." Mr. Clements testified that at the time he made the decision that Mr. Cox would be included in the reduction in force, he was not aware that Mr. Cox had participated in a public meeting of the cyanide group which occurred August 15 or 16. Mr. Clements stated that he would have guessed Mr. Cox was married, but did not know that his wife worked for LMES. Mr. Clements testified that he first became aware that employees in Oak Ridge had concerns about cyanide and heavy metals when he read some articles in the paper, but could not recall the time

frame. He stated that he could not recall when he first learned that the employees had requested a NIOSH investigation. Mr. Clements testified that he had not discussed the concerns “per se” with other managers or supervisors because they did not involve any areas for which he was responsible. Mr.

Clements testified that he was not aware of any supervisor being disciplined for discouraging or punishing employees for raising concerns since 1994. TR 1025-1027, 1030, 1048, 1049.

Mr. Clements testified that he did not know why Peter White went to K-25 to have a meeting with respect to Mr. Cox’s layoff. Mr. Clements stated that there was an attorney present at the meeting with Peter White, but could not recall which attorney although he added that it was usually Pat McNutt who attended. Mr. Clements testified that he did not know whether or not Ms. McNutt was involved in the layoff of Mrs. Cox. TR 1035, 1036.

Mr. Clements testified that there was no individual that he thought should have been terminated in order to retain Mr. Cox. Mr. Clements stated that when determining who will be RIFed the process demands that comparisons are kept within the peer group. Mr. Clements stated that relative to employees Stan Justice, Charlie Beal, Lee Lawson, Mr. Hamilton, Mr. Cox could have competed for a vacancy in their positions if there had been one. TR 1031-1033, 1037.

Mr. Clements testified that he had received guidance stating that employees who were eligible for voluntary reduction in force would not be eligible for the involuntary reduction. Mr. Clements stated that under this guidance the reductions of Joe Mincey and Jack Hill were deferred at the August layoff. Mr. Clements testified that even if Mr. Mincey or Mr. Hill would have been included in the reduction, it would not have impacted Mr. Cox’s layoff.³³ TR 1040.

Mr. Clements testified that the granting or suspending of clearances were an issue between the employee and the DOE, LMES was not involved. He explained that there is a series of things done when a clearance is suspended including restricting access to classified areas, removing the employee from the classified access list, issuing new badges, and suspending access to all computer systems. Mr. Clements stated that once computer access is denied, the employee’s division manager is notified that there must be a determination of what access to unclassified computer systems is needed based on the employee’s job function. Mr. Clements stated that when the decision to suspend Sherrie Farver’s clearance was made by DOE, he received a letter informing him of the suspension. He testified that Ms. Farver’s access was ultimately restored. Mr. Clements testified that he did not suggest that Ms. Farver put in for a Q clearance because the division manager was the one to decide what clearance his employee needed. Mr. Clements admitted that LMES received notice of Ms. Farver’s suspension from DOE dated May 23, 1997. Mr. Clements admitted that he acted on that notice. TR 1041, 1045-1048, 1055, 1056, 2277; RX-31.

Mr. Clements testified that he did meet with Mr. Cox at his request after the layoff notices were distributed. Mr. Clements related that he felt he answered most of Mr. Cox’s questions, but

³³Mr. Hill and Mr. Mincey were subsequently laid off in the January 1997 reduction. TR 1040.

could not show him the comparison list used to determine who would be laid off because company policy prohibited showing the list to employees. TR 1049-1050.

Mr. Clements testified that Lee Lawson was not included in the reduction in force because he had received distinguished service and constantly exceeds ratings the two prior years, and his time with the company was comparable to those being compared. Mr. Kesterson was not included in the reduction because he had more time with the company. He added that the fact that Mr. Kesterson was in building maintenance at Y-12, where there were significant issues related to the area at the time of the reduction, could also have been considered. Mr. Clements testified that Mr. Phillips was not laid off because he was qualified to be re-armed if necessary which made his future assignments more flexible. Mr. Clements admitted that Mr. Cox had more time with the company than either Mr. Cody or Mr. Phillips and that both were unarmed at the time, but explained that Mr. Phillips could be armed if necessary. Mr. Clements testified that even if he had felt that Mr. Phillips and Mr. Cody should have been included in the reduction, he could not have given them reduction notices at the same time because they were eligible to be pensioned. TR 1051, 1052, 1054, 1055, 1060, 1061.

Mr. Clements testified that he was aware that Harry Williams had filed a complaint against the company. Mr. Clements stated that he was not aware that Mr. Cox had been interviewed by legal counsel for the company in Mr. William's case. TR 1052.

Mr. Clements testified that all DOE employees were obligated to follow DOE orders. Mr. Clements stated that the security personnel inside PSO are responsible for enforcement of DOE orders relating to security matters and they receive training and annual refreshers to carry out their responsibilities. Mr. Clements testified that Mr. Cox would have been one of the trainees prior to 1994. Mr. Clements confirmed that the DOE manual in the section called "Security Area Controlled Articles" lists the privately owned items not permitted in a limited area without prior authorization including audio, video, optical or data equipment. TR 2277-2281; RX-29.

Mr. Clements confirmed that documentation showed that Mr. Cox entered through portal two on the 4th of September at 7:04, and at 7:09 entered the administrative building into the limited area on the second floor. Mr. Clements confirmed that portal two included a sign saying restricted area and listing the prohibited articles including reproduction equipment, transmitters, and similar kinds of articles. He explained that the second floor of the administrative building is a limited area which requires either an "L" or "Q" clearance. Mr. Clements confirmed that a sign on the access door into the second floor of the limited area indicated that an "L" clearance was required to enter and listed prohibited articles. Mr. Clements testified that there was a badge reader at the doors 30C and 30D³⁴ which did not differentiate between the two entrances. Mr. Clements stated that the sign at 30D designated the area as limited with an "L" clearance necessary. Mr. Clements stated that this area was limited in 1996. Mr. Clements testified that one of the responsibilities of his organization was to maintain the signs at the portals. Mr. Clements testified that when Mr. Cox surreptitiously recorded a conversation with Larry Pierce on the second floor of 9704-2 on the morning of

³⁴30C is the interior door and 30D is an exterior door. TR 2287.

September 4, 1996 he violated DOE orders. Mr. Clements testified that if he had been made aware of Mr. Cox's violation of DOE orders he would have initiated disciplinary action and recommended termination. He added that he had never had a case of intentional violation by employees although a number of recorders were secured from visitors. Mr. Clements testified that he was not aware of anyone being fired for taking a tape recorder into a secure area. TR 2281-2287, 2297, 2299-2302; RX-28, RX-30A, RX-30B.

Mr. Clements testified that David High had been counseled by Mr. Woods about various incidents. Mr. Clements stated that, to his knowledge, Mr. Woods had never been counseled by Mr. White. Mr. Clements testified that there are many avenues for employees to raise concerns which are delineated in several company publications including going directly to DOE without consulting their supervisor. Mr. Clements stated that his direct subordinates deal with DOE almost every day and usually inform him afterwards that there was something that they needed to report immediately. Mr. Clements testified that he had never criticized an employee for going to DOE first or for not telling him everything they discussed with DOE. He remarked that his subordinates had gone to his direct supervisor, Mr. Gustavson. Mr. Clements stated that there is a general expectation that the employee, after going to DOE or a direct supervisor, relate the general discussion to him so that he would know what had transpired. He had never directly told employees to do so. Mr. Clements testified that his management style was not to micromanage, but to empower his employees to do the job and to hold them accountable. TR 2311-2314, 2316, 2317.

Linda Jayne Cox

Linda Cox testified that she was a facility operator specialist who had been employed by LMES for 19 years. Mrs. Cox testified that she began her career at LMES as an hourly janitor, moved to janitor supervisor, and at the time she went on short-term disability was a facility operator. Mrs. Cox stated that when she was a laundry supervisor her supervisor was first Brenda Williams and then Eva Graves. She stated that when she assumed the position of facility supervisor she was not given the promotion and the increase in salary until months later. Mrs. Cox added that her take home pay was about \$1800 a month and she also had all the benefits that LMES provides. TR 1063-1065.

Mrs. Cox testified that she was not in good health and suffers with memory problems, stomach ailments, chronic fatigue, fibromyalgia, headaches, muscle and joint pain, loss of hair, and kidney problems among others. She stated that both her long and short term memory loss was severe. Mrs. Cox testified that her health began to decline in 1987 and she actually noticed a dramatic difference in 1989 when she was working at K-25. Mrs. Cox stated that in late 1994 or early 1995 she told her boss, Brenda Williams, about some of her health problems because she was missing work often. Mrs. Cox added that she may have mentioned it to Eva Graves also. Mrs. Cox testified that she often went to the medical department at K-25. Mrs. Cox related that when she started working for Jim Thompson in 1996, she told him of her medical problems because by that time she was missing two or three days of work a week. Mrs. Cox stated that she also told Mr. Thompson about the results of a urine test, ordered by her rheumatologist, Dr. James Burns, which showed high levels of thiocyanate. She stated that she showed Mr. Thompson the test results in

conjunction with a medical incident report she filed. Mrs. Cox testified that policy initiated by Jim Dalton, Brenda William's supervisor, mandated that whenever an employee filed a medical incident report the supervisor of that person should turn in a report to Mr. Dalton. Mrs. Cox testified that she knew that the nurse from the medical department called her supervisor because she was there when the nurse spoke to Brenda Williams. She added that she would forward medical incident reports for employees she supervised to Mr. Dalton immediately. TR 1065-1075.

Mrs. Cox testified that shortly after turning in the medical incident report, in April 1996, she started attending the meetings of Coalition for a Healthy Environment (CHE) which began as a support group for individuals with similar symptoms. Mrs. Cox testified that she felt that her symptoms were related to chemical exposure at the facility. She explained that she first linked her symptoms with exposure at the facility when she heard of other people with high thiocyanate levels experiencing similar symptoms. Mrs. Cox testified that managers Fred Metkson, in maintenance, and Chris Elliott, a supervisory fireman, knew that she was a member of CHE because they began attending the meetings. Mrs. Cox testified that there was a meeting between some CHE group members and Harold Conner, the plant manager on August 5, 1996. Mrs. Cox stated that Mr. Conner called Ann Orick to come and meet with him and Ms. Orick called some of the others to attend. Mrs. Cox testified that Fred Mynatt, then president of the company, attended some of the meetings. TR 1076-1082.

Mrs. Cox testified that she did receive a memo from the company dated April 16, 1996 informing DOE employees that those laid off would have hiring preferences at other DOE facilities. TR 1085.

Mrs. Cox testified that she and her husband signed a NIOSH form titled "Request for Health Hazard Evaluation." Mrs. Cox testified that the form was filled out by Sherrie Farver at the meeting in late April after discussion by the group. Mrs. Cox testified that all of the other 14 LMES employees who signed the form were either laid off or were on disability. Mrs. Cox testified that Bill Noe, Regina, Cheri Westfall, Ben Austin, and her husband, Lynn Cox, were all laid off.³⁵ Mrs. Cox stated that in July of 1996 she sent a letter to Karen Worthington, a nurse at NIOSH, raising concerns about the studies that NIOSH had done and requesting a copy of the studies. Mrs. Cox testified that she sent a copy of the letter to Lockheed Martin managers Norma Augustine, Gordon Fee, Fred Mynatt, and Harold Connor and to James Hall at DOE. TR 1089-1092, 1094, 1095.

Mrs. Cox testified that she had been interviewed on local television stations four or five times. Mrs. Cox stated that she was on local channels 6 and 8³⁶ on June 4, 1996 identifying the health problems at K-25. Mrs. Cox testified that Harold Conner and Ralph Hutson were also on TV with her that night. Mrs. Cox stated that she could not recall whether or not she identified herself

³⁵Mrs. Cox stated that she was "sure" that all those listed were laid off except for Mr. Austin whom she was not sure. TR 1091.

³⁶The cable channels 6 and 8 were actually channels 6 and 10 and covered the eastern Tennessee area including all of Knoxville. TR 1096.

as a member of CHE on TV. Mrs. Cox testified that she had at times made a statement that she felt that the health problems were caused by chemical contaminants at the plants, but added that she could not recall the specific dates that she made such statements. Mrs. Cox stated that she did purchase a copy of the June 4, 1996 interview. Mrs. Cox testified that shortly after the June 4th broadcast, she and her husband, Ann Orick, Kathy Swain, Sherry Farver, D.R. Fudge, and Ralph Hutson, among others, were questioned by news announcer Alan Williams at the TV station. Part of the meeting was included on the evening news that night. Mrs. Cox stated that there was an additional interview prior to August 6, 1996 done at the Oak Ridge Civic Center. Mrs. Cox testified that those present included herself, her husband, Cheryll Dyer, Harry Williams, and Bill Noe. Mrs. Cox stated that the issues discussed included the incinerator at the plant, cyanide, and other problems which the employees felt were making them sick. TR 1095-1099.

Mrs. Cox testified that a member of the medical staff at the plant requested that she see a psychiatrist. Mrs. Cox stated that she "had problems with the request" because she felt that there was an inference that she was "crazy." Mrs. Cox testified that she was very depressed but that the depression was understandable as she had recently lost her father and her son had attempted suicide. TR 1100.

Mrs. Cox testified that she was asked to wear a cyanide monitor by Industrial Hygiene at the plant. Mrs. Cox stated that as the monitor was being put on her Jim Thompson, a manager, came in and remarked that she "didn't look very well." Mrs. Cox stated that because she became very ill and was sent home that day, she only wore the monitor for 3.5 hours. She added that some weeks later she was asked to sign a form stating that she had worn the monitor for 8 hours and that no cyanide was detected. Mrs. Cox stated that she refused to sign the form as she had not worn the monitor for 8 hours. She added that Mr. Thompson did not comment on her refusal to sign the form. TR 1100-1102, 2984.

Mrs. Cox testified that on June 21, 1996 her doctor authorized short-term disability leave, which can extend up to 6 months, because she was missing two or three days a week due to her illness. Mrs. Cox stated that in August, while she was on leave, she received a call from Jim Thompson who advised her that she would be receiving a certified letter stating that she would be laid off. Mrs. Cox testified that she asked Mr. Thompson if her layoff had anything to do with her illness, her disability leave, or the fact that she had addressed the cyanide issues. She stated that Mr. Thompson told her that the reason was because her position had been eliminated and she was no longer needed, and her layoff was unrelated to the other issues. Mrs. Cox testified that Mr. Thompson denied that she could not be laid off while she was on disability leave. Mrs. Cox explained that because she was a supervisor, she knew that this was not proper procedure, therefore she called Benefit Plans which substantiated her belief. Mrs. Cox admitted that Mr. Thompson did not make a distinction between being notified of a RIF and being removed from the payroll. Mrs. Cox admitted that she understood that a layoff notice would not be issued while on disability. Mrs. Cox testified that she then called her boss's supervisor, Jim Dalton, who told her that she was being laid off because her position had been eliminated and denied that the layoff had any connection to her sickness or her vocal stand on the cyanide issue. Mrs. Cox stated that Mr. Dalton commented that he would look into the issue of whether she could be laid off while on disability leave. Mrs.

Cox testified that she also called Mr. Thompson to discuss the propriety of her layoff and that it was Randy Burnette, a LMES employee under Mr. Thompson, who returned her call. Mrs. Cox testified that she could not recall whether it was Mr. Dalton, Mr. Thompson, or Mr. Burnette who ultimately informed her that her understanding was correct and, therefore, the layoff notice would be rescinded and she would be terminated the day she returned from disability leave. TR 1103-1108, 2986, 2993.

Mrs. Cox testified that when she asked Mr. Thompson and Mr. Dalton if she could bump back to laundry supervisor or janitor supervisor because there were supervisors who had less time than she did, she was told that there was no bumping allowed in this RIF. Mrs. Cox stated that she remembered instances where salaried employees were bumped back to prior jobs if they were targeted for lay off. Mrs. Cox admitted that she could not recall if LMES had allowed bumping since they ran the facility. Mrs. Cox admitted that she was not aware of any bumping that occurred in the layoff announced in August of 1996. Mrs. Cox admitted that the employees who were bumped in 1985 filled vacancies and therefore did not displace anyone. TR 1109, 1110, 1143, 1144.

Mrs. Cox testified that at present she is on long-term disability which would continue for another year for a total of two years. Mrs. Cox testified that the fact that she was targeted for layoff did not affect her disability pay which, on long-term, amounted to 60% of her salary. TR 1110.

Mrs. Cox testified that Jim Pope in laundry had less time with the company than she did and Reba Barton in the janitorial department had more company time but less supervisory time than she did. Mrs. Cox testified that she felt that her layoff, which was later rescinded, was related to her bringing up health and other concerns. Mrs. Cox testified that she was taken from the laundry and moved to a position, compliance officer and facility specialist, for which she was not qualified and had never been trained. Mrs. Cox stated that she asked her supervisor specifically if she was being put into a job that would later be eliminated and she would no longer be needed. Mrs. Cox testified that she had no choice but to take the lateral transfer, and remained in the position for the year and a half prior to going on disability. TR 1112-1115.

Mrs. Cox testified that she had, since 1992, addressed the issue of harassment by her supervisor, Eva Graves. Mrs. Cox testified that Ms. Graves consistently found fault with her supervisory decisions and would speak to her in a "nasty" manner. Mrs. Cox stated that she eventually called the DOE hotline to complain because she had gone through the chain of command and nothing was done. Mrs. Cox testified that Ms. Graves called her in and said "How do you think I'm going to feel when I'm giving you your performance appraisal? How do you think I'm going to rate you?" Mrs. Cox stated that when she asked Ms. Graves whether she was threatening her, she was told she could take it any way. TR 1115-1117.

Mrs. Cox testified that she also expressed concerns about contamination in the laundry. Mrs. Cox testified that some laundry was contaminated with, among other things, asbestos and beryllium. Mrs. Cox admitted that others actually collected the laundry and ran the washing machines. Mrs. Cox stated that she expressed her concerns about whether the laundry was handled in compliance with DOE requirements to Ms. Graves and Ms. Williams. Mrs. Cox testified that she felt that she lost her job because she was vocal on these issues. TR 1117-1119, 1141.

Mrs. Cox admitted that she got along well with Mr. Dalton who started in the laundry in 1993. Mrs. Cox admitted that when she was promoted to facilities operations specialist in late 1994, she was supervised by Ms. Williams and then Mr. Thompson, Ms. Graves ceased being her supervisor prior to 1995. Mrs. Cox also admitted that she got along well with Mr. Thompson and Ms. Williams and the only manager she had trouble with was Ms. Graves. TR 1124-1127.

Mrs. Cox admitted that she and Mr. Cox had discussed that RIFs were taking place at K-25 even before they were affected. Mrs. Cox stated that he did tell her that he thought her position was going to be eliminated before she received the layoff notice. TR 1128.

Mrs. Cox admitted that she filed her medical incident report on March 28, 1996 which indicated that she believed that her illness was cyanide related. Mrs. Cox admitted that when the plant sent her to Dr. Paret, an occupational specialist, her blood level was three. Mrs. Cox stated that at that time she had been away from the plant for nine weeks. Mrs. Cox admitted that she had not supplied the results of the blood test to NIOSH. TR 1128-1130.

Mrs. Cox admitted that the request for a NIOSH health hazard evaluation made by CHE could have been made after a NIOSH investigation prompted by LMES had already been initiated. Mrs. Cox admitted that she had signed the CHE request which read in part "NIOSH has made an initial visit relative to cyanide and/or cyanide compounds and employee intoxication at the K-25 site." TR 1130-1132.

Mrs. Cox admitted that she had not attended any meetings with Harold Conner related to cyanide issues prior to April 17, 1996 the time she signed the paper. Mrs. Cox admitted that she did attend meetings with Mr. Conner, Mr. Thompson, and Mr. Mynatt after that time and that Mr. Thompson took her to the Industrial Hygiene Department for a meeting after she filed the medical incident report. Mrs. Cox admitted that the first truly public meeting of the CHE was on August 15, 1996. Mrs. Cox admitted that although there was mention of the August 15 meeting in the *Oak Ridger*, neither she nor Mr. Cox was mentioned. Mrs. Cox admitted that she and Mr. Cox appeared in a newspaper article only after she received her layoff notice. Mrs. Cox further admitted that at least one of the TV appearances were after she received the layoff notice. TR 1132-1135.

Mrs. Cox admitted that she did not agree with the NIOSH report that found no cyanide at K-25 which would result in excessive exposure. Mrs. Cox admitted that she wrote letters to Mrs. Worthington at NIOSH, President Clinton, Vice-President Gore, and many others because she felt strongly that the report was in error. Mrs. Cox admitted that she was aware that LMES had conducted examinations that had the same findings of no cyanide as the NIOSH report. TR 1136, 1137.

Mrs. Cox admitted that CHE was instrumental in selecting Dr. Byrd from Boston as an independent medical examiner brought in by LMES to evaluate employees complaining of cyanide related illnesses. Mrs. Cox stated that she had not received the results of her examination from Dr. Byrd. TR 1137-1139.

Mrs. Cox admitted that the other facility operator specialist in the maintenance division, Dennis Bolton, had more service time with the company and more time in the job than she did. She also admitted that Mr. Bolton was probably more knowledgeable in the position. Mrs. Cox admitted that she received a “consistently meets”, a level three rating, for her performance in that job. Mrs. Cox admitted that she received ratings from both Brenda Williams and Mr. Thompson after her last rating from Eva Graves. She stated that she received the level two rating, “consistently exceeds”, from Brenda Williams before being assigned to the laundry. TR 1139-1141.

Mrs. Cox testified that she thought that she was put in a position to be laid off because she had raised health and safety concerns for a couple of years through the chain of command at LMES and ultimately to DOE. Mrs. Cox stated that she had addressed issue of health and safety and harassment, but nothing was ever done to correct her concerns. She added that when she was placed in the new position, she asked her supervisor if he was putting her in the job to be RIFed. TR 2984, 2985, 2988.

Mrs. Cox admitted that she got along with Mr. Thompson and Mr. Dalton. Mrs. Cox testified that she did not know of any reason that either of them would select her for a RIF other than the fact that she went beyond them to complain. Mrs. Cox admitted that in a prior deposition she had answered that she did not “know of any reason either of them would have selected her for layoff” and that “the only person she did not get along with was Eva (Graves).” Mrs. Cox stated that in answering the question she was referring to the fact that she did not feel that she had given anyone a reason to lay her off nor had anyone offered a reason. TR 2990-2992.

Mrs. Cox stated that Mr. Cox took the recorder to the meeting with Mr. Pierce because he had gone to every supervisor after receiving his layoff notice and each gave him a different version of why he was laid off. Mrs. Cox testified that Mr. Cox would never have brought the recorder in otherwise. TR 2994.

Delbert Lynn Cox

Lynn Cox testified that he had worked for LMES for twenty years and the last position he held was administrative captain. Mr. Cox testified that he was initially hired as a guard and in 1989, after 13 years as a guard, was promoted to lieutenant, and then in 1990 was promoted to shift captain. Mr. Cox stated that he was a shift captain for approximately a year when he left to have back surgery and later returned to assume administrative duties. He explained that after his return he was no longer an armed captain because he could not participate in the physical fitness program necessary to carry a weapon. Mr. Cox admitted that to qualify to carry a firearm you must be able to run both a half-mile and a 40-yard dash in a specified length of time. Mr. Cox testified that he probably could have returned to the physical fitness program, but that Chief Thompson, his supervisor at the time, felt he should not risk re-injuring his back. Chief Thompson informed him that there was a place for him in administrative duties, therefore he stayed in administration beginning as administrative assistant to Chief Thompson and relief scheduling officer at K-25. Mr. Cox testified that when the 3 plants were consolidated in early 1994, he was moved to Y-12 where he was titled support administrative captain. He added that while he was at Y-12, his manager was

Bryan Lamb who reported originally to Mr. Bradshaw and subsequently to John Woods. Mr. Cox explained that after about a year he was assigned to work with an incentive task order team under George Cobham, who reported directly to Mr. Clements, to work on drawing up a contract to present to LMES if they decided to bid out the security operations. Mr. Cox stated that in March of 1996, the team moved to the building at K-25. He explained that he had worked on a DOE mandated absentee program at K-25 which included keeping records of employees on short-term and long-term disability, checking on their progress, and letting them know they were not forgotten. Mr. Cox stated that while he was at K-25 he assumed he was reporting to Sam Thompson and Brenda Tilley because when he needed supplies he had to go through them. Mr. Cox testified that he never reported to John Woods and did not recall ever speaking to Mr. Woods after his return to K-25. He admitted that he heard Mr. Thompson's testimony stating that Mr. Woods was his supervisor, but again stated that he reported to Sam Thompson. Mr. Cox testified that Mr. Thompson reported to Brenda Tilley, who reported directly to either Peter White or Mr. Clements. He stated that Mr. Clements was Ms. Tilley's ultimate supervisor. Mr. Cox testified that it was his understanding that while he was working with the incentive task order team in 1996 that K-25 had specifically asked Mr. Clements or Mr. White that he be reassigned to that facility to help get the absentee program running as he had been involved with it at Y-12. Mr. Cox testified that, but for the request to have him return to K-25, he would have remained at Y-12 because he enjoyed working with that group. Mr. Cox stated that he did not know whether the position at Y-12 was temporary or had a definite end point. Mr. Cox testified that he assumed once the task was completed, he would return to his original job assignment. TR 1145-1152, 1222.

Mr. Cox testified that he discussed Mrs. Cox's health problems with Bryan Lamb at Y-12 telling him of her high thiocyanate and cyanide levels which he felt caused her illness and were related to chemical exposure at the plant. Mr. Cox testified that he had also talked to Chief Sam Thompson about Mrs. Cox's health problems in late 1995 or early 1996 when he visited K-25. Mr. Cox stated that he told Chief Thompson that Mrs. Cox was very sick and her cyanide levels were very high. He added that he advised Chief Thompson to be tested as he had worked at the plant longer than Mrs. Cox. He added that he talked to Brenda Tilley about Mrs. Cox's illness and also about her involvement in Citizens for a Healthy Environment (CHE) in late May or early June 1996. Mr. Cox remarked that Ms. Tilley told him that her husband, who worked at K-25, had symptoms that the doctors could not identify. TR 1152-1154, 2970, 2971.

Mr. Cox testified that he was involved with the CHE from its initial meeting and attended meetings with his wife almost every time she went. Mr. Cox testified that he read some but not all of Mrs. Cox's doctors' reports and firmly believed that she will never be able to work again because of the profound weakness she suffers. TR 1154-1156.

Mr. Cox testified that he brought a video camera to the NIOSH meeting to record the proceeding. He stated that he assumed everyone saw him as he stood during the meeting while the other attendees sat. Mr. Cox testified that there were several managers from LMES present at the meeting including Harold Conner and Larry Pierce and many others he knew by face only. He added that he had met Mr. Conner prior to the NIOSH meeting as he had participated in "stand-up" meetings at the plants which involved both managers and staff. Mr. Cox stated that he assumed

Mrs. Cox had met Mr. Conner prior to the NIOSH meeting because she was a supervisor and involved in many areas of the plant. TR 1156-1158.

Mr. Cox testified that his health impairments include short and long-term memory loss, trouble concentrating, and sleep apnea. He added that although his cyanide level was normal, he did have high levels of cadmium in his system. Mr. Cox testified that he did not file a medical incident report because he did not feel it would accomplish anything, and he did not want to be sent to a psychologist or psychiatrist as his wife had been after she filed such a report. Mr. Cox admitted that Mrs. Cox was not the only employee sent for a psychological evaluation. TR 1158-1162.

Mr. Cox testified that of the employees who signed the NIOSH request letter he was not sure how many were out on disability and how many were laid off, but felt that only two remained working. He stated that he was shocked, dismayed, angered, and saddened when he was laid off because shortly before he received the layoff notice, Sam Thompson came by his office and said "You don't have anything to worry about. Your job is safe." Mr. Cox testified that this was Mr. Thompson's response when he joked about not taking vacation because his job might not be there when he returned. He admitted that it was well-known throughout the plant that budget constraints were going to result in a RIF, but he felt his particular layoff was not a legitimate budgetary decision. Mr. Cox testified that what puzzled him was that when he went to the managers he worked for and asked if they were questioned as to what kind of employee he was or whether or not they could use him, he found that none of his supervisors had been consulted. Mr. Cox stated that there were employees with less service being retained. TR 1163-1166, 1169.

Mr. Cox testified that there was a heated debate going on in Oak Ridge concerning chemicals in the workplace with strong opinions on both sides. He stated that he had seen Mr. Conner on television and at the NIOSH meetings discussing the chemical exposure issues. Mr. Cox admitted that he had not heard any discussion in the work place between managers, but had heard them discussed by employees in the work place. TR 1169-1171.

Mr. Cox testified that the company did not inform him that he could use the remaining time on the active payroll to look for work. Mr. Cox admitted that he was advised to use the company career center to seek employment, which he did. He added that he continued to work from the time he received the layoff notice until he actually left the plant and was not relieved of most of his duties during that period. Mr. Cox testified that he had turned in at least five applications for employment since he was laid off in late October of 1996. He stated that he had received 6 months of unemployment compensation but was not eligible for another 6 months. Mr. Cox admitted that he

had not been actively seeking employment for the last two or three weeks because he was taking care of Mrs. Cox who was wheelchair bound after an auto accident. TR 1196-1199, 1228.

Mr. Cox admitted that he had stated in a previous deposition that he was basically in good health which he considered being able to "get up and function without being assisted or having to depend on someone else." Mr. Cox stated that he has been in better health. TR 1200, 1201.

Mr. Cox admitted that although he tried to video tape the meeting at which the NIOSH report was presented, his video camera was not operating properly. Mr. Cox testified that there was someone else taping the meeting and he assumed it was a plant employee. He admitted that although he recalled several managers from LMES being present at the meeting, he could not recall the names. Mr. Cox stated that he did not recall whether that meeting was the first environmental meeting he attended. TR 1201-1204, 1223.

Mr. Cox testified that he helped to set up the informational meeting that was held in Oak Ridge on August 15. Mr. Cox stated that he was the master of ceremonies for the meeting which including introducing the speakers and giving a brief agenda. Mr. Cox admitted that he was not sure whether he was mentioned in the newspaper article referencing that meeting. Mr. Cox admitted that he could not recall whether all the articles in the newspaper in which he was mentioned were after his layoff. TR 1204-1206.

Mr. Cox stated that he tended to have a mistrust of plant management in general because he felt that he was not told the truth in conversations with different managers. Mr. Cox stated that he had been told by management on one occasion that every position in the department would be bid and that turned out not to be true. Mr. Cox admitted that weekly jobs were posted for bid, but salaried personnel were not allowed to bid on weekly jobs, they could only ask to be considered for the positions. Mr. Cox admitted that he did not ask to be considered for any of the jobs, but would have, if he had known he would be laid off. Mr. Cox testified that in the last two or three years he had heard other employees discussing distrust of management at least once a week. TR 1224, 1225, 1227, 1228.

Mr. Cox testified that he had taped a conversation during a scheduled appointment with Mr. Pierce in his office sometime in August after he received his layoff notice. Mr. Cox explained that he had a recording device in his briefcase, and did not inform Mr. Pierce that he was recording the conversation. Mr. Cox stated that he felt that it was not against DOE rules to bring a recorder into a non-sensitive area which did not have a security officer and, therefore, did not get permission to bring the recorder into Building 9704-2 at Y-12, the location of Mr. Pierce's office. TR 915, 917-921.

Mr. Cox admitted that he may have stated in a prior deposition that his meeting with Larry Pierce took place a month after his layoff notice. Mr. Cox admitted that in the prior deposition he was not asked whether he had taped the meeting with Mr. Pierce and that he did not volunteer the information. Mr. Cox testified that although he had known Mr. Pierce for twenty years and his father was a next door neighbor, he had never been in Mr. Pierce's house nor had he had personal contact with him. TR 1206, 1210-1212.

Mr. Cox admitted that he did not have "any feeling one way or the other" about bringing the tape recorder on the premises. He added that the rules for the property protection areas at K-25 had been relaxed to allow such devices in. Mr. Cox testified that he had personal knowledge of several individuals bringing such devices in and nothing happened when they were discovered. Mr. Cox testified that he taped the conversation with Mr. Pierce because he did not want any words

exaggerated on Mr. Pierce's part or his own. Mr. Cox testified that when he had gone to several managers concerning his layoff and "received no answers", and was not allowed to see the list he was compared with, he anticipated having to take legal action to "even get the list." Mr. Cox stated that he suspected at that time that his layoff was related to his group activity. TR 1213, 1214, 1226.

Mr. Cox admitted that when he went to Y-12 for the meeting with Larry Pierce on September 4, 1996 he used his badge to enter through portal two. Mr. Cox admitted that he then proceeded to building 9704-2 where Mr. Pierce's office was located. Mr. Cox stated that he thought he went into the building on the first floor and then used the inside stairs to get to the second floor. TR 2272-2274.

Mr. Cox testified that Louis Cody, Lee Lawson and Mr. Phillips should have been laid off before him and they were still employed at LMES. Mr. Cox remarked that those three individuals were not in positions where they had to wear a sidearm and to the best of his knowledge Mr. Cody and Mr. Lawson could not be rearmed. Mr. Cox admitted that he did not know that these 3 men were over 50 and eligible for the pension incentive program prior to the August layoff and were, therefore, not eligible for layoff. Mr. Cox admitted that no one had ever told him that he was a bad captain. Mr. Cox testified that when he received his layoff notice and inquired why Peter White was present, Ms. Tilley replied that she had him come because there were some questions that she could not answer. Mr. Cox testified that when he was moved from Y-12 to K-25 only his computer was moved and that was done by maintenance. Mr. Cox testified that Mr. Woods told him that he was being sent back to K-25 to set up the absentee and outreach program mandated by the DOE audit which he had done at Y-12. TR 1214-1218, 297, 2972.

Mr. Cox testified that some of the meetings he attended with Mrs. Cox were at the home of Dr. and Mrs. Reid, but could not recall Dr. Reid or Dr. Oesch ever being present. TR 1219.

Dr. Ralph Oesch

Dr. Ralph Oesch, a staff physician at LMES, testified that his supervisor at K-25 was Dr. Robert Bernstorff who was himself supervised by interim supervisor Dr. Jones. He added that Dr. Daniel Conrad³⁷, Director of the Medical Department in 1995, is now retired. Dr. Oesch testified that he suffered cyanide poisoning in 1981 and 1982 when he was a physician in Houston. Dr. Oesch testified that he had training from the Agency for Toxic Substances and Disease Registry (ATSDR). He added that he had approximately 30 hours of training in different toxins through the ATSDR and numerous continuing medical education courses at the American College of Occupational and Environmental Medicine meetings which dealt with toxicology. Dr. Oesch testified that he has treated many individuals with cyanide poisoning in private practice, but had treated very few since coming to LMES in Oak Ridge in March 1987. TR 1232, 1233, 1234, 1236, 1239.

³⁷Dr. Conrad is board certified in occupational medicine and internal medicine. TR 1510.

Dr. Oesch testified that he had taken approximately 30 or 40 medical incident reports at K-25 related to cyanide exposure. Dr. Oesch stated that after receiving his first report of cyanide exposure about February 1995, Dr. Ann Roberts instructed him to inform her if he received additional reports. He remarked that after 11 or 12 additional reports, he addressed the cyanide issue at a meeting in July 1995 with Dr. Roberts, Dr. Dan Conrad³⁸, and Larry Perkins. He was instructed not to test or treat anyone for cyanide. He was also instructed not to have an outside practice where he would treat or test anyone employed by LMES because of the risk of lawsuits. Dr. Oesch stated that he was not given a rationale for not testing for cyanide and had never before been counseled not to run specific tests.³⁹ Dr. Oesch stated that he was instructed not to give medical literature or toxicological literature directly to patients, but was allowed to supply the information to a patient's physician. Dr. Oesch stated that the rationale, as he understood it, was that there would be an implication that LMES would be admitting an occupational hazard if the literature was given directly to the patient. He remarked that he did not feel giving patients literature would mean that he was making a diagnosis of cyanide poisoning because he felt that such a diagnosis would involve a 3 tier analysis of investigation, symptoms, and testing and response to treatment. Dr. Oesch stated that prior to this meeting he was not aware of any restrictions on his ability to treat outside patients. He remarked that Dr. Conrad said that he should consider this a warning. Dr. Oesch added that he then became concerned for his job. He stated that if he had a patient he thought was experiencing symptoms of cyanide intoxication, he could inform the patient that he may want to see a private physician. Dr. Oesch added that he would ask who the patient's physician was and ask if the patient would like some information sent to the physician.⁴⁰ Dr. Oesch remarked that he did not note his opinion on the patient's chart unless the patient made a specific request as he was given the impression that this was a very sensitive and dangerous subject as far as his future employment went, although no one told him not to make such notes. He added that he was not aware of Dr. Bernstorf's, his current supervisor, position on the policy. Dr. Oesch testified that he had heard Dr. Bernstorf comment that there was "nothing to" the workers' belief that they were affected by cyanide. Dr. Oesch stated that he did not agree with Dr. Bernstorf's comment. Dr. Oesch admitted that there was nothing in medical literature such as the "Journal of the American Medical Association" to affirm his belief in the subject of cyanide intoxication, but stated that there was "strong supportive information" in the industrial medical literature. He testified that the adverse effects he experienced were the result of exposure to cyanide that was within permissible limits. TR 1246, 1247, 1249-1251, 1253-1255, 1259, 1265-1267, 1275, 1276-1282, 1406, 1418-1420, 1501.

Dr. Oesch testified that around July or August 1995, in a meeting with Larry Perkins and Dr. Conrad, he was instructed not to use the word cyanide. Dr. Oesch stated that prior to being told

³⁸ Dr. Oesch testified that Dr. Conrad was the supervisor over all 3 plants and his second level supervisor. TR 1249.

³⁹ Dr. Oesch testified that at a later date, in a specific case, he was instructed not to test for fluoride. TR 1265, 1266.

⁴⁰ Dr. Oesch testified that he sent information to approximately 60 physicians. TR 1406, 1407.

by Dr. Conrad that he could not use the word cyanide or test for cyanide he had seen approximately 13 patients who had test results higher than the laboratory-stated upper limit of normal for urine thiocyanate. Dr. Oesch that he could not recall whether he had seen Mrs. Cox regarding cyanide intoxication. TR 1350-1353.

Dr. Oesch admitted that he felt that he was complying with the rules and regulations of DOE, NIOSH, and any other relevant agency in handling patient's incident reports. He added that the only time they wrote up cyanide intoxication as an occupational incident was when it was requested by the patient. Dr. Oesch stated that he did feel the instructions from Dr. Conrad and Mr. Perkins were contrary to government requirements as recent changes heavily favored the release of knowledge or information to patients, and he thought that disallowing the use of the word cyanide would contradict the rule. He admitted that it was not in contradiction to any specific rule he could identify. Dr. Oesch also admitted that he was not aware of any medical incident reports that were refused. TR 1463-1467, 1486.

Dr. Oesch testified that a memo concerning the instructions he was given at the July 1995 meeting was requested by Sandra Seeley of DOE. Dr. Oesch stated that other than that memo he made no other statements, writings, diary entries, or memos to any files, concerning the instructions. Dr. Oesch added that he did recall writing out his interpretation of the verbal instructions to show to Dr. Conrad, Dr. Roberts, and Mr. Perkins to make sure he was clear on what they expected.⁴¹ He stated that he gave a copy of his interpretation to his direct supervisor, Dr. Roberts. Dr. Oesch stated that he, on one occasion, was instructed not to take a blood cyanide level on a patient who experienced convulsions at the plant. Dr. Oesch testified that he thought that the individual may be exceptionally cyanide sensitive, therefore, he ordered blood drawn to take blood cyanide levels, but Dr. Roberts told him not to perform the tests. Dr. Oesch stated that the patient was sent to Methodist Medical Center by K-25 ambulance. Dr. Oesch testified that the half-life of cyanide is from 20 minutes to an hour and the ride to the hospital in a speeding ambulance would take approximately 20 minutes, however, no testing for cyanide was done at the hospital. Dr. Oesch stated that cyanide is water soluble, but once it is in the blood it is attracted to the +3 form of iron and because the blood is primarily +2 iron, the cyanide quickly leaves the bloodstream and enters the tissues. Dr. Oesch

testified that he did not inform the hospital that he suspected cyanide as he thought that was the responsibility of his supervisor, Dr. Roberts. TR 1267-1274, 1352.

Dr. Oesch testified that, if permitted, he would have treated patients suffering with cyanide intoxication with small doses of sodium thiosulfate salt which was approved for intravenous injection for treatment for acute cyanide poisoning and, in addition, would have recommended a special type of vitamin B-12 called hydroxocobalamin.⁴² Dr. Oesch stated that these treatments

⁴¹CX-179, p. 1351.

⁴²Dr. Oesch testified that sodium thiosulfate was included in the cyanite antidote treatment kits found in emergency rooms and hydroxocobalamin is an antidote used for cyanide poisoning. Only hydroxocobalamin required a prescription. All other elements could be obtained at a health food

were relatively harmless.⁴³ Dr. Oesch admitted that he did not know what specialty was best suited to treat toxic exposure. Dr. Oesch testified that he was not aware that there was a controversy as to whether individuals who feel that they have been exposed to toxins have an organic versus a nonorganic problem. TR 1255-1258.

Dr. Oesch testified that following his first review after the 1995 meeting on the cyanide issue, he received a needs improvement rating and was not given a raise. Dr. Oesch stated that in all previous years, 1985-1994, he received a continually meets rating. TR 1260, 1261.

Dr. Oesch testified that Dr. Bernstorff became his supervisor in 1987 and Dr. Roberts became his supervisor in approximately 1990. Dr. Oesch stated that Dr. Conrad retired about 1996 and Dr. Roberts and Mr. Perkins both left the company the same year. TR 1277-1279.

Dr. Oesch testified that hair, urine, or blood samples of LMES employees have not been taken since the 1995 directive. He stated that he did not know whether the directive actually applied to anyone but himself. Dr. Oesch testified that to his knowledge NIOSH did not take blood or urine samples. Dr. Oesch added that he had no personal communication with NIOSH and never received instruction to contact them or not to contact them. TR 1283-1285.

Dr. Oesch testified that, based on medical literature he has read, the symptoms that would be manifest in cyanide exposure are chronic fatigue, headaches, mental problems, memory problems, irritability, abnormal heart rate, shortness of breath, neurological problems, distal nerve problems, and weight gain or loss. Dr. Oesch admitted that some of the symptoms such as headaches and fatigue are subjective. He stated that if these symptoms are present, the patient should also be tested for low thyroid, other endocrinological problems, or infectious diseases. He added that if the symptoms of cyanide intoxication are mild, it is usually highly treatable. TR 1304-1306, 1310, 1417.

Dr. Oesch explained that there are written procedures for the medical department at LMES. He stated that there are no written procedures relating to cyanide at all. Dr. Oesch testified that he could tell a patient he suspected cyanide poisoning, could refer them to an outside physician at their expense, and could then consult with the outside physician. Dr. Oesch added that he felt these guidelines were too narrowly drawn both because he thought that he had more expertise in the area of cyanide intoxication than the physicians the patients were referred to, and, because he thought some physicians may be reluctant to give patients information on environmental illnesses because of disagreement as to whether stress plays a bigger role than environmental pollutants in illnesses.

store. Dr. Oesch stated that the only problem he had encountered with the treatment was an assumed allergic response to sodium thiosulfate by Ann Orick. However, Dr. Oesch testified that because thiosulfate's half-life is only 20 minutes and the allergic response was said to last for weeks, it was probably a reaction to the thiosulfate. TR 1256, 1257, 1354.

⁴³Dr. Oesch testified that chelation, however, should be done carefully and not in an outpatient setting. TR 1264.

He added that he thought that if the information went directly to the physician, the patient might never receive it. Dr. Oesch admitted that LMES may be concerned about his operating outside their liability insurance. Dr. Oesch testified that he saw approximately 200 employees from K-25 whom he thought showed symptoms of cyanide exposure. TR 1314, 1315, 1440, 1490-1492.

Dr. Oesch testified that he had an extreme sensitivity to cyanide and had experienced symptoms of cyanide intoxication since he was 28 years old. Dr. Oesch stated that his symptoms include weight loss, chronic fatigue, memory problems, and shortness of breath. TR 1318.

Dr. Oesch testified that the purpose of the medical department at LMES is to fulfill the OSHA requirements for physicals on persons in particular programs including respirator, asbestos, and hazardous waste. He added that the medical department also treated work place injuries and every day employee illnesses. Dr. Oesch testified that he was not aware of any instance where test results were not allowed to be placed in a patient's file upon request. Dr. Oesch stated that it would not surprise him if Dr. Roberts or someone else stated that they did not want information related to cyanide poisoning placed in a patient's file. He stated that usually the medical department wanted patient information in a file even if they were not authorized to treat the specific condition referenced. Dr. Oesch testified that DOE orders do govern the medical departments at LMES although there is some freedom and flexibility. Dr. Oesch stated that he did not know whether DOE orders permitted the instructions that were given in the July 1995 meeting. His impression was that the decision was made by Dr. Conrad. Dr. Oesch testified that he did not mention cyanide intoxication to patients while Dr. Conrad was employed at LMES. He added that he did counsel patients he thought were suffering cyanide intoxication that they could treat themselves with items available at the health food store cautioning that if the treatment did not improve their symptoms, it was indicative of an alternative diagnosis. Dr. Oesch testified that he began informing the patients of possible cyanide intoxication after Dr. Conrad retired. Dr. Oesch stated that Larry Perkins, who was present at the meeting where Dr. Conrad informed him that he could not discuss cyanide exposure, had left LMES before Dr. Conrad. TR 1322, 1323, 1325-1327, 1424-1427.

Dr. Oesch testified that he could not recall ever hearing anyone in the medical department at K-25 instructing a worker to talk to the company before hiring a lawyer. Dr. Oesch stated that the general policy on occupational injuries and illnesses is that they are to come through the clinic and be referred to a doctor so that financial compensation will be handled properly through insurance. TR 1328, 1329.

Dr. Oesch testified that there is an open debate in Oak Ridge concerning the cyanide and heavy metal issues. Dr. Oesch stated that his impression was that certain individuals in the community feel that a cyanide problem would adversely affect property values and local industry while others feel that the health and welfare issues needed to be addressed. TR 1329.

Dr. Oesch testified that his impression was that Harold Conner was very supportive of patients' health and interested in finding out what was wrong so that patients could be treated properly. He added that input from non-medical management had been extremely positive. Dr. Oesch testified that he felt there was a "real dichotomy" between what he was hearing or being told

by LMES's management and what he heard from medical. Dr. Oesch testified that Mr. Conner established the cyanide work groups in 1996. He was invited by David Milan, head of health and safety at K-25, to participate in the research subgroup because he was knowledgeable on the subject of cyanide contamination. Dr. Oesch admitted that he was the only M.D. in the group and that he was allowed to express his views with awareness and consent of the company. He added that his participation was considered part of his work for LMES. Dr. Oesch admitted that some employees, possibly including Ms. Farver and Ms. Walzer, did have "highly emotional responses" to the findings that no impermissible exposure limits had been found in the tests done by LMES. Dr. Oesch admitted that the NIOSH reports showing similar findings were made known in a public meeting. He stated that he felt that Drs. Lockey and Byrd, the doctors brought in by LMES to study the cyanide issue, were competent relative to known information, but that cyanide intoxication was unknown by most. Dr. Oesch admitted that neither Drs. Lockey and Byrd nor the Governor's Panel found that the employees' illnesses were linked to cyanide because exposure at K-25 was within the legal limits. Dr. Oesch admitted that he was invited to speak before the Governor's Panel and that none of his supervisor's tried to influence his testimony. Dr. Oesch admitted that Dr. Edelman, an occupational medicine specialist at Vanderbilt University, was engaged by LMES to evaluate employees' symptoms. Dr. Edelman did not make a diagnosis of cyanide intoxication. Dr. Oesch stated that he did not agree with Dr. Edelman's methodology as it did not include blood and urine tests for thiocyanate. TR 1330-1332⁴⁴, 1412-1417, 1433-1435, 1442-1447, 1476.

Dr. Oesch testified that the major recommendations of the cyanide working group, which included a survey of K-25 employees (and their families) looking at health problems and a comparison of urine thiocyanate studies, had not been carried out. Dr. Oesch admitted that the suggestions made by the cyanide group to bring in outside doctors was implemented. TR 1478, 1486.

Dr. Oesch testified that a group called the Phoenix team was established to attempt to bring more jobs to K-25. He added that at the same time he was participating in the Phoenix team he met with people at X-10 and K-25 regarding obtaining grants to do cyanide research. Dr. Oesch testified that none of his grant proposals to do cyanide research were ever funded. He admitted that he had never submitted a grant proposal to the National Institute of Health. Dr. Oesch stated that he believed that there was research being conducted on patients who were sick and had positive blood cyanide, but this differed from his own findings in as much as he did not start out by actually researching, but rather as a private practitioner treating patients. TR 1381, 1383, 1421, 1422.

Dr. Oesch testified that he first made his interest in cyanide known to LMES in 1987 and in 1995, in applying to speak at the international meeting on hazardous waste, he presented writings on the topic he desired to be published to Dr. Conrad. Dr. Oesch admitted that Dr. Conrad indicated that he was free to present the paper at the meeting, but should not associate the company with his views. Dr. Oesch admitted that LMES paid for his transportation to the meeting in Atlanta. He admitted that it was possible that Dr. Conrad would have allowed him to pursue his research in

⁴⁴Dr. Oesch stated that Mr. Milan had been in Health and Safety but thought that he may have changed positions or jobs. TR 1332.

cyanide intoxication if he had received a grant. TR 1383-1385, 1388, 1397, 1398.

Dr. Oesch admitted that much of his belief regarding cyanide came from self-diagnosis. Dr. Oesch stated that he first became afflicted in 1981 while living in Houston and became symptomatic again in Philadelphia and Pitman, New Jersey while serving in the Navy. Dr. Oesch admitted that he did not consult naval physicians concerning his care and treatment after self-diagnosing. He stated that he was hospitalized and physicians were consulted prior to his self-diagnosis. He also admitted that no one else diagnosed cyanide exposure as the source of his illness. Dr. Oesch testified that he was given a medical discharge from the Navy based on chronic severe paranoia existing prior to duty⁴⁵ He added that post discharge he was exposed to cyanide significant enough to cause symptoms in 1991 and again, to an increased degree, in 1994.⁴⁶ Dr. Oesch admitted that he self-diagnosed at these times also. Dr. Oesch testified that although he did diagnosis his wife with cyanide intoxication, her diagnosis was confirmed by an internal medicine specialist in New Jersey. He added that Mrs. Oesch had not suffered symptoms in Oak Ridge to the degree she did in New

Jersey. Dr. Oesch testified that although tests may not indicate cyanide, air levels below those detectable could be associated with illness in sensitive or susceptible persons. TR 1391-1396.

Dr. Oesch admitted that he did devise treatment plans for cyanide intoxication, but that they consisted of proven antidotes. He added that he thought he was the first to discover the “entity of environmental cyanide pollution and intoxication and the first to make all the developments that have occurred regarding that subject.” Dr. Oesch admitted that Dr. Conrad told him that he felt he had used poor judgment in prescribing something or in diagnosing something that had not been established in the medical literature. However, he stated that he recalled Dr. Conrad calling it bad legal judgment, not bad medical judgment. Dr. Oesch admitted that Dr. Conrad told him he considered his treatment research, but could not recall Dr. Conrad stating that the work was in the nature of research on human beings that had not been established in medical literature. Dr. Oesch remarked that he did not consider his treatment research; he considered it developing a way to treat sick people. Dr. Oesch stated that he did not recall telling Dr. Conrad that he felt God had sent him to Oak Ridge to do this work, but did recall mentioning that the events in Houston had drawn him back into medicine. Dr. Oesch admitted that Dr. Conrad said something to the effect that his

⁴⁵ Dr. Oesch testified that in granting him a “Q” clearance the DOE considered the allegations of paranoia proposed by the Navy. Dr. Oesch stated that because the clearance was dependent on his proving cyanide intoxication and, therefore, disapproving paranoia and because the Department of Energy suggested he go to the Navy and get his diagnosis changed, he felt there was a specific finding that he was not paranoid. Dr. Oesch testified that because it was prohibitively expensive to have the diagnosis legally changed, he did not pursue it. TR 1468-1471.

⁴⁶Dr. Oesch believes that there is no air in the troposphere which does not contain cyanide although not always at a level to induce symptoms even in a sensitive individual. TR 1393.

diagnosis may mislead employees, and they may not seek treatment that would be more appropriate. Dr. Oesch stated that he did not consider it reasonable for Dr. Conrad to think that what he was doing was inappropriate given the medical mission of the medical department at Oak Ridge because he (Dr. Oesch) did not tell patients that they had cyanide intoxication rather he encouraged them to see other physicians and search for any other possible cause of their illness. Dr. Oesch testified that he felt that not investigating the possibility of an illness for which the treatment was harmless was not appropriate. Dr. Oesch admitted that at no time was he asked not to convey his belief to any member of the medical community in the area. TR 1389, 1390, 1398-1403, 1408.

Dr. Oesch admitted that he was aware that LMES had performed hundreds of air sample tests for cyanide which were all negative, but was not aware of water and soil testing for the same. Dr. Oesch admitted that he was aware that NIOSH testing reached the same conclusion. Dr. Oesch admitted that he was familiar with the tests done by the University of Alabama which opined that the procedures used by LMES to detect cyanide were appropriate. TR 1395-1397.

Dr. Oesch testified that he did not believe that K-25 was a special source of cyanide, but did feel that the incinerator that was brought in and burned fossil fuels was a source of cyanide. Dr. Oesch remarked that he had not seen the results of the company's tests which showed no detectable limits of any toxins emanating from the incinerator. Dr. Oesch added that LMES did not test for cyanogen chloride and nitrile compounds. He did not know if NIOSH tested for these toxins. TR 1409-1411, 1472.

Dr. Samuel Conrad

Dr. Samuel Conrad, a physician board certified in both occupational and internal medicine, was medical director for LMES from 1986 to 1997. Dr. Conrad testified that the symptoms of acute cyanide intoxication are difficulty breathing, elevated pulse, a drop in blood pressure and, finally, cyanosis and death. He added that the symptoms of chronic cyanide intoxication were similar including respiratory distress, tachycardia, blood pressure failure and, eventually death if the dose of cyanide is high. Dr. Conrad explained that if one with chronic intoxication leaves the exposure area the symptoms will usually reverse with no lasting effects. TR 1509-1511, 1519-1521.

Dr. Conrad testified that Larry Perkins, manager for safety and health at K-25 and Dr. Sandy Robert's immediate supervisor, was in the chain of command in July and August of 1995. Larry Perkins reported to plant manager Harold Conner. Dr. Conrad stated that he reported to Dr. Fred Mynatt, executive vice-president of the company. TR 1524, 1527.

Dr. Conrad testified that he met with Dr. Oesch and Mr. Perkins in the medical department at K-25 in August of 1995 to discuss Dr. Oesch's unauthorized treatment of employees which had been reported to him by Dr. Sandy Roberts. Dr. Conrad stated that he requested that Dr. Oesch discontinue treating employees experimentally. He explained that Dr. Oesch was treating employees on company premises for a condition that had no basis in scientific literature and that could not be attributed to a problem at the plant. Dr. Conrad testified that he did not do a literature search for references to chronic cyanide intoxication because he felt he gleaned enough information from his

toxicology text, his medical text, and his occupational medicine text. Dr. Conrad testified that he told Dr. Oesch if he wanted to do research he could do so at ORNL, LMES's scientific laboratory and experiment with animals. Dr. Oesch did not follow this suggestion. Dr. Conrad stated that he told Dr. Oesch to consider it a verbal warning to discontinue the treatment practice. He explained that he had made the decision that the treatment should not be authorized because there was no validity in the treatment and because LMES was not in the business of treating people for non-occupational conditions. He stated that his concern was for the health of the employees and he feared that they may be directed to a non-existent disease when they needed treatment for something else. Dr. Conrad explained that LMES did not treat private illnesses, other than on a short-term basis to allow employees to finish a work day or few days, but were concerned with occupational disease, prevention and treatment. Dr. Conrad testified that the DOE regulation relative to providing medical services could be complied with, at least in certain areas of the country, by just providing out-patient services. Dr. Conrad stated that they would allow Dr. Oesch to discuss possible cyanide intoxication with the employees' private physicians, but they did not want him claiming cyanide intoxication as a valid diagnosis in their health service department. Dr. Conrad remarked that he did not condone testing blood or urine for cyanide as there was no source of cyanide at K-25 and without a source, there could be no exposure. Dr. Conrad admitted that even when medical incident reports were submitted to the medical department, showing high cyanide levels in employees, LMES did no blood or urine testing because it was not considered occupational. Dr. Conrad added that the Industrial Hygiene Department had all the facts on exposure and they found no source at K-25. Dr. Conrad admitted that he had nothing in writing stating that there was no source of cyanide at K-25, but he had seen the results of surveys which showed no cyanide. He added that if an employee felt that he was suffering some illness relative to cyanide exposure that was work related, they would accept the employee's report and then let the safety department check out the incident. Dr. Conrad testified that

company practice, not law, required incident reports. Dr. Conrad admitted that he did not recall that DOE mandated medical incident reports. TR 1525-1531, 1535, 1536, 1560, 1564, 1567-1570, 1578, 1581.

Dr. Conrad testified that Dr. Oesch did assert to him that he (Dr. Oesch) was a leading expert in the field of environmental cyanide exposure. Dr. Conrad stated that Dr. Oesch had concluded that employees were suffering from cyanide intoxication based on the symptoms he observed and the high thiocyanate levels in their urine. Dr. Conrad remarked that thiocyanate is a natural chemical and high levels could be the result of eating fruits such as peaches, cherries, or apricots. Dr. Conrad stated that another major source of thiocyanate is smoking cigarettes. He testified that urine thiocyanate levels are not useful except to follow people who work with cyanide on a regular basis to follow fluctuations in their levels. Dr. Conrad admitted that he was not aware that Commander Harry Williams, of LMES security, had a urine thiocyanate levels 7 times that of non-smokers, but opined that he would check the reliability of the data and look for a possible source. TR 1542-1544, 1557.

Dr. Conrad testified that no one had ever come to him with the wealth of complaints that Dr.

Oesch had testified were related to chronic cyanide intoxication. Dr. Conrad stated that if someone had, he would take a history related to their symptoms, do a brief overall exam, and refer them to their own physician for further evaluation with a brief statement why they were being referred. TR 1561, 1562.

Dr. Conrad testified that he did remember a problem related to Ms. Farver or someone else trying to bring in outside lab reports to include in their LMES medical record. Dr. Conrad stated that it was not LMES policy to include outside lab work unless it was provided by the individual's physician.⁴⁷ He explained that they did allow inclusion of medical reports, but not isolated lab results. Dr. Conrad admitted that he could not recall receiving an e-mail relative to Ms. Farver's request. TR 1572-1572.

Dr. Conrad testified that if an employee's medical problem could result in the company incurring large expenditures, he would still reference necessary medical treatment as the employee's health comes first. Dr. Conrad stated that if the condition is occupational the first priority is to get the problem addressed and then to make sure that no other employees incur the same condition. TR 1575.

Dr. Conrad admitted that he was not aware that Dr. Oesch had drawn a blood sample which showed bright red venous blood on an employee of K-25 who was having convulsions and Dr. Roberts refused to authorize testing the blood for cyanide. Dr. Conrad testified that, in the first instance, he supported Dr. Robert's not testing for cyanide as it was in the best interest of the patient to get to the emergency room as soon as possible and in the second instance, the special equipment necessary for testing the blood was not available on site at K-25. Dr. Conrad testified that if Dr. Oesch suspected cyanide poisoning it would have been more prudent for him to have administered acute treatment using amyl nitrite and sodium thiosulfate intravenously. TR 1583-1585.

Dr. Conrad admitted that around 1993 when CNN did a segment on the environmental problems at Oak Ridge, he would not answer newsmen's questions related to Dr. Reid's case as he was advised by G. Wilson Horde of the LMES legal department not to discuss anything as it was in litigation. He added that he was one of several being sued by Dr. Reid and was being represented by the legal department of LMES.⁴⁸ Dr. Conrad stated that he followed the advice of counsel as he felt the news media had a tendency to distort. Dr. Conrad admitted that he made no investigation into the physician from the Oak Ridge facility who referred to Dr. Reid as "that crazy doctor" in the CNN report. Dr. Conrad testified that he was "not in the habit of responding to negative features" which skewed the information without investigating all the facts. He remarked that CNN did not bother to get LMES's side of the story. Dr. Conrad admitted that they did try to interview him for the feature and he declined. TR 1593-1596, 1605, 1606, 1617-1619, 1653.

⁴⁷Dr. Conrad testified that he could not recall if the policy was written or stated. TR 1573.

⁴⁸Dr. Conrad stated that Dr. Reid's suit was dismissed finding he was not an employee of Methodist Medical Center which he accused, along with LMES, of trying to run him out of town.

Dr. Conrad admitted that he told Dr. Reid, as far as LMES knew there was no problem with heavy metals at Oak Ridge. Dr. Conrad testified that he had not told Dr. Reid that he “wouldn’t tell him what metals we had at K-25.” He added that a mercury study had been done where metals like lead were used, but he could not discuss everything because of the classifications. Dr. Conrad stated that Dr. Reid was basing his theories on results from a lab that had been discredited for using unacceptable standards. Dr. Conrad testified that he had stated that it was strange for Dr. Reid to talk of heavy metals suppressing the immune system because toxicology reference cite a hyperstimulation of the immune system as a possible result of heavy metal exposure. Dr. Conrad stated that he would disagree with Dr. Reid’s statement that Oak Ridge is a potential Bhopal. TR 1609, 1619-1621, 1634, 1645.

Dr. Conrad testified that “file trimming” is a term generated by LMES or DOE to reference the disposal of files of which the office was not the primary generator. He stated that the company designated a period of time for file trimming. Dr. Conrad testified that he was sure his secretaries met any requirement to keep an index of the destroyed files. He admitted that he was aware that under DOE rules it is unacceptable to use secrecy to hide problems. TR 1636-1638.

Dr. Conrad testified that he had no objection to the formation of the group The Exposed or the Coalition for a Healthy Environment. Dr. Conrad admitted that he felt that the illnesses experienced by the members of these groups were not related to chronic environmental cyanide poisoning. Dr. Conrad stated that his major concern was that these individuals were not receiving appropriate care because they were wasting their time on “fictitious illnesses.” Dr. Conrad testified that some of the problems experienced were non-organic. Dr. Conrad remarked that he was not unhappy about the activities of these groups and thought that managers at LMES were eager to come to a conclusion as to what was happening. Dr. Conrad admitted that the managers, like anyone else, did not like to be criticized. TR 1646-1650.

Joe Wayne Culver

Joe Culver, director of communications and public affairs for Lockheed Martin Energy Research Corporation, testified that his job involved leadership of the public affairs organization at Oak Ridge National Laboratory. Mr. Culver stated that he reported to Dr. Alvin Trivelpiece, director of Oak Ridge National Laboratory and president of Lockheed Martin Energy Research Corporation (LMER). Mr. Culver testified that he also handled public affairs for Lockheed Martin Energy Systems. Mr. Culver stated that he had never been involved professionally or directly with the “cyanide issue.” TR 1659, 1688.

Mr. Culver testified that his office monitored press reports by buying circulations to newspapers and doing database searches on the internet. Mr. Culver stated that he was aware of the series of articles on Oak Ridge run in the *Tennessean*. Mr. Culver admitted that he wrote a column on his home computer for the *Oak Ridger* expressing strictly personal opinions referencing the *Tennessean* articles. Mr. Culver stated that he did not submit the article to anyone at Oak Ridge National Laboratory before sending it to the newspaper. He testified that his opinions, as expressed

in the column, were still valid, but were directed towards the newspapers and their coverage, not toward people. He explained that he “had concern about reporters’ tendency to let their personal biases or lack of intellectual capacity cover what they write.” Mr. Culver stated that the column was a satirical statement of his feeling toward reporters. TR 1662, 1663, 1665, 1666, 1669-1671.

Mr. Culver testified that three Monday mornings after the *Tennessean* articles ran he participated in conference calls to decide if there was sufficient factual error in the articles that the company needed to issue a clarification. Mr. Culver stated that the conference calls included Martin Musolf, manager of the community relations at East Tennessee Technology Park; and Steve Wyatt, assistant manager for public affairs at the DOE’s Oak Ridge operations. Mr. Culver testified that the three managers participated in all three calls and a DOE representative, but not always the same one, participated also. He stated that the group decided there was nothing in the articles that necessitated a response. Mr. Culver testified that no written record was made of the conference calls. TR 1674, 1679, 1689.

Mr. Culver testified that the *Oak Ridge National Laboratory Review* is a quarterly which highlights research and development at Oak Ridge National Laboratory. He stated that Carolyn Krause, a member of his staff, is the editor and primary writer. Mr. Culver testified that an article in the publication was probably from notes taken by Ms. Krause from a speech given by Dr. Trivelpiece on the “state of the lab.” TR 1682, 1683.

Mr. Culver testified that he had not been involved in any discussions with LMES, LMER, or DOE managers regarding The Exposed or Coalition for a Healthy Environment. TR 1672.

Carl Hugh Peterson

Carl Hugh Peterson, LMES division manager for K-25, testified that the primary work done at K-25 is environmental management or clean-up work, on and off site, including storage, disposal, and incineration of waste. TR 1719, 1720.

Mr. Peterson testified that in 1984 he became manager of plant support and protection which included the security department until 1992. He stated that in 1992, security was moved from his management and became a centralized function. Mr. Peterson explained that Peter White reported to him, Sam Thompson reported to Peter White, and Harry Williams reported to Sam Thompson, therefore, he was in the chain of command several levels above Harry Williams. Mr. Peterson testified that he thought that Mr. Cox, whom he knew as a lieutenant, was a very competent employee who did very satisfactory work. His opinion emanated from personal observation and reports from his subordinates. Mr. Peterson stated that although he did not remember Mr. Cox as a captain, he would have been the one who approved his promotion from lieutenant to captain on the basis of the recommendation of his supervisor, Mr. White. TR 1721-1725.

Mr. Peterson testified that there was an absentee problem at LMES when he was in charge of security. He stated that Mr. Cox did not have an absentee problem. Mr. Peterson remarked that absentee control, which was achieved by tracking individual and overall absences, is a very

important function at K-25. Mr. Peterson testified that the lieutenants and captains in the security department only had responsibility for ascertaining the legitimacy of absences of security personnel. He stated that at that time, only three people, including Mr. Cox, worked under Mr. Williams in security. Mr. Peterson added that he did not know if Mr. Cox participated in absentee control because his subordinates designate who would perform that function. TR 1726, 1727, 1731-1734.

Mr. Peterson testified that he had no involvement in Mr. Cox's employment leading up to August of 1996. He stated that he could not remember if he knew that Mr. Cox's spouse worked for LMES. Mr. Peterson testified that he had nothing to do with Mrs. Cox's employment or lack thereof for any reason. Mr. Peterson stated that he was aware of other husbands and wives that work at K-25. Mr. Peterson testified that prior to 1992 he was involved, on an annual basis, in the review of Mr. Cox's performance appraisals. Mr. Peterson stated that he reduced Mr. Cox's rating from a "consistently exceeds" (CX). Mr. Peterson testified that a supervisor rates his employees then the appraisal moves up the chain until it reaches the division manager. Mr. Peterson stated that because the bell curve is used to allocate CXes, everyone cannot be above average. Mr. Peterson testified that once the ratings reach his desk, they are reviewed and prioritized based on the employees' contribution to their organization, the total security division, and any contributions to the plant. A line is then drawn at a certain level and anyone falling below that line does not deserve a CX rating. Mr. Peterson stated that this is the process that resulted in Mr. Cox receiving a lower rating than that proposed by his supervisor. Mr. Peterson testified that the most common cause of a reduction in rating was because supervisors want to do the best for their employees, although they are aware that a high rating is often changed because of the limitation on the number allowed. Mr. Peterson testified that after Mr. Cox left his supervision and prior to Mr. Cox's discharge in 1996, he did not hear anything from any supervisor concerning Mr. Cox. Mr. Peterson stated that he knew what Mr. Cox did and they talked on occasion, but because he did not work with him directly, he did not know him well. TR 1734-1739.

Robert Bruce Hunter

Robert Hunter, security operations manager at Y-12, has been employed by LMES since December 3, 1990 when he began his employment as a security officer at K-25. He was promoted eventually reaching his current position in May 1996. TR 1992-1995.

Mr. Hunter testified that he was not aware that Mr. Cox had duties related to absenteeism. He stated there was a process to deal with excessive absenteeism. Mr. Hunter explained that there are several levels that an individual can be placed in based on the number of absences or the length of absences. He stated that level one might be a certain number of absences in a month or in three months and level two would be a certain greater number of absences within those same periods. Mr. Hunter testified that if the employee did not have a certain number of absences in a quarter then he would revert to a lower level in the step program. Mr. Hunter stated that the company also tried to maintain contact with absentees to let them know that the leadership and the management of the organization is concerned and to check on their condition. Mr. Hunter testified that the employee would usually be called once every two weeks, but there is no set requirement as to how often an employee would be called. Mr. Hunter testified that the duty of calling the absent employees is an

additional duty of the security officer on the shift, not a primary duty. TR 1796-1799, 1803.

Mr. Hunter testified that he was aware that Mr. Cox was requested to return to K-25 in 1996, but did not know who made the request. He stated that he was involved in meetings that Mr. Cox attended between December 1990 and September 1993 and that they worked well together. Mr. Hunter testified that he was never in a position to rate Mr. Cox. He added that he generally heard from Mr. Cox's supervisors that Mr. Cox did an adequate job. TR 1804, 1805.

Mr. Hunter testified that he was not bothered when an employee went outside the chain of command to address an issue. He stated that LMES had an open door policy which allowed an employee to go to someone higher in the chain of command than their immediate supervisor without fear of retribution. TR 1807, 1808.

Mr. Hunter testified that David High, the exercise physiologist assigned to PSO, raised concerns to DOE about employees, particularly guard supervisors and security officers at Y-12, shunning the exercise program. Mr. Hunter stated that the poor relationship between Mr. High and the Y-12 protective force began long before he arrived at Y-12. Mr. Hunter testified that during a DOE inspection in 1996, Mr. High opined that the supervisors were not supervising the exercise programs properly and the employees were not participating. Mr. High's remarks resulted in written findings from the DOE. Mr. Hunter testified that he was frustrated in his efforts to try to get the

findings resolved because of a lack of trust between the shift commander and Mr. High. Mr. Hunter testified that they had worked through the problems. TR 1809, 1813-1815.

Mr. Hunter testified that there were several complaints of harassment by four or five different employees in the company outside of protective services against Mr. Floyd Glenn, a check point security guard, claiming that he was overbearing, intimidating, and rude. Mr. Hunter stated that he first met with Mr. Glenn on these issues on September 9, 1996 in a session that included Steve Gibbs, chief of protective force; Scott Sanders, the union steward; and a shift commander whom he could not recall. Mr. Hunter testified that he focused on trying to make Mr. Glenn understand how he was viewed by other employees, how a more positive approach would be beneficial, and how he could improve his interpersonal skills. Mr. Hunter stated that it became a very confrontational meeting as Mr. Glenn would not accept that he had a problem with his interpersonal skills and felt that the problem was always with the other person. Mr. Hunter testified that a second meeting was essentially the same as the first with the addition of one new complaint against Mr. Glenn. Mr. Hunter stated that from Mr. Glenn's perspective he was doing his job and doing it properly. Mr. Hunter testified that Mr. Glenn, by decision of the division manager, is currently in the positive discipline program where he was given an option of staying home with a day's pay to consider whether he wanted to return to the company and work within the company's rules and standards. Mr. Hunter stated that if Mr. Glenn was subsequently put in positive discipline again, it would generally result in termination. Mr. Hunter testified that Mr. Glenn did not deny the allegations, but had his own interpretation of the events. He remarked that he did not recall why Mr. Glenn was on extended sick leave prior to the first meeting. Mr. Hunter stated that Mr. Glenn was not involved in any organizations concerning the environment at Oak Ridge. Mr. Hunter stated that

the individuals who complained about Mr. Glenn did not reference the nature of his illness or whether he was truly sick or whether he was spending too much time on environmental activities. TR 1825-1836.

Mr. Hunter testified that he had no part in the decision to lay off Mr. Cox in 1996. He stated that he did not “know”, but assumed that Mr. Cox was married when he was laid off. Mr. Hunter testified that he had no participation in the decision to layoff Mrs. Cox. TR 1847.

Peter Douglas White

Peter White, manager of security operations for LMES, is responsible for the security programs at K-25. Mr. White testified that he had approximately 400 people under his command. TR 1868.

Mr. White testified that ultimately it was the vice president of human resources, Mack Wilson, who decided to RIF Mr. Cox when he reviewed the RIF Review Board recommendations. He explained that budget reductions forced the identification of positions to be eliminated and incumbents in those positions underwent a peer review process where the actual individuals to be laid off were identified. Mr. White testified that the positions that were to be eliminated were those that were thought to have the least impact on continuing operations. Mr. White testified that Butch Clements approved the list before it went to the first board which was chaired by Larry Pierce and to a second board chaired by the vice-president of human resources. Mr. White stated that Butch Clements would have been the first to decide that Mr. Cox was to be laid off. He added that the budget demanded that an administrative position be eliminated and the choice was to lay off either an armorer (one who maintains firearms) or a procedure writer. Mr. White testified that it was determined that a fully trained armorer was needed more than an administrative captain. He explained that the peer comparison was made relative to all personnel in like positions and based on company procedure utilizing age, company service, performance ratings, time in position, and any special skills. Mr. White testified that the ranked list that emanates from this process goes to the two RIF Review Boards which review the recommendations to determine if everything was done fairly. Mr. White stated that the first RIF board is handled by the labor relations manager which in the case of protective services is Larry Pierce. He explained that Brenda Tilley, Butch Clements, Larry Pierce, and Mack Wilson were involved in the decision to lay off Mr. Cox. Mr. White stated that the whole process takes 10 days to 2 weeks. Mr. White testified that in the case of Mr. Cox, because protective services was told that they were not to be included in the October RIF and then were included, the process took approximately three weeks. Mr. White added that the RIF Review Boards did not check employee records because the RIF was budget, not performance, driven. Mr. White testified that he was not aware whether anyone spoke to Sam Thompson in advance of the upcoming RIF. Mr. White stated that he did not know if Sam Thompson was surprised at Mr. Cox's layoff, but that Brenda Tilley should not have been surprised as she was involved in the process and actually recommended that the position held by Mr. Cox be eliminated. Mr. White stated that the task order team was disbanded before the RIF and, therefore, had no relevance to Mr. Cox's layoff. He explained that Mr. Cox was sent back to K-25 as part of the May 1996 reorganization that reassigned several personnel from what was a central organization back to their respective sites. Mr.

White stated that when Mr. Cox was reassigned to K-25, he did not leave a vacancy that had to be filled. TR 1869-1874, 1877-1880, 1988, 1991.

Mr. White testified that the protective force at K-25 had less problem with absenteeism than the other sites. Mr. White admitted that one of Mr. Cox's duties was to function as absentee control officer at K-25 checking on about 70 employees. He added that Mr. Cox also functioned as procedure writer and admitted that within the protective forces there were a multiplicity of orders and procedures that were constantly being revised. TR 1881-1884.

Mr. White testified that he had disagreed with Sam Thompson on a "consistently meets" performance evaluation that he had given him, and Mr. Thompson spoke to the plant manager and to the K-25 diversity manager. TR 1886, 1887.

Mr. White testified that every individual had a right to testify before the Governor's Blue Ribbon Committee and to go before the DOE and criticize his supervisor. Mr. White stated that he did not consider it an affront to his dignity when one of his employees did so. He added that he had never given instructions to his employees not to volunteer information to external auditors. TR 1891, 1892.

Mr. White testified that he had never talked to Mr. High about his contact with DOE or about testifying in any proceedings. Each time Mr. High had chosen to exercise his right, Mr. High had informed him and on one occasion had even given him a copy of the letter he had written to DOE. Mr. White testified that on one occasion Mr. High understood his immediate supervisor, John Woods, as representing that he had to use the chain of command. Mr. High told a DOE safety representative that he, as per his supervisor, could not speak to him. Mr. White testified that Mr. Woods spoke with Mr. High stating that what Mr. High understood was not what Mr. Woods intended to communicate. Mr. White stated that he knew that Mr. High ultimately spoke to the DOE investigator because he received a DOE issued report. Mr. White testified that Mr. High and Mr. Woods got into an "e-mail war" about the DOE incident. He stated that he personally could not recall the specific contents of the communications. Mr. White testified that a number of Mr. Wood's subordinates by-passed Mr. Woods and came directly to him and Mr. Woods did not complain of the employee's actions. TR 1894-1900, 1904, 1905.

Mr. White testified that he could not recall any documents or memoranda using the terms attitude adjustment. Mr. White stated that, to his knowledge, no subordinate of his had been told that they needed an attitude adjustment. He remarked that Mr. High may have told Mr. Woods that he needed an attitude adjustment. Mr. White stated that he had heard references made to the fact that Mr. Glenn had a hostile attitude in dealing with other personnel. TR 1900-1902.

Mr. White testified that there are rad time requirements to enter and exit K-25. Mr. White explained that rad time is short for radiation control and health physics mandated that protective

clothing, shoe scuffs and a lab coat be worn in the K-25 building.⁴⁹ Mr. White testified that if a security person went into the building he would be required to wear the protective clothing unless he was responding to an emergency or breach of security. Mr. White stated that, to his knowledge, there had been no security breaches in the K-25 building. Mr. White testified that the radcon rules had been changed in 1989-1990 time period to expand the areas requiring protective clothing. Mr. White stated that he did not recall any specific safety meetings that were dedicated to radcon issues, but admitted that every two years employees had G.E.T. training that included radcon and radiation training. Mr. White testified that the question as to whether there was anything in the buildings that could endanger employees was very recently asked as a part of a project that is ongoing in the K-25 building regarding the removal of some equipment. Mr. White stated that the operators cutting through pipe that contained uranium residue in oxide form were dressed in rad clothing and wore respirators. This prompted security employees to inquire why they were not instructed to wear respirators also. Mr. White stated that the employee union actually raised the issue and was told that the safety work permit mandated that the operators wear the protective garb because they were directly over the pipe. The protective force people were some distance away and, therefore, did not need the protection. Mr. White testified that he did not know who developed the safety work permit or whether there were federal guidelines or regulations concerning the issue. He explained that previously all employees wore dosimeters which gauged exposure to radiation, but within the last year the mandate was changed to limit the use to those who worked in specified areas. Mr. White stated that according to the dosimeters no one in his group was exposed to radiation. TR 1909-1910, 1912-1918, 1994, 1995.

Mr. White testified that the outside audits were not resented as Dr. Trivelpiece stated in his State of the Lab address many years ago. He opined that it was "extremely healthy" to have outside people conduct audits and identify areas needing improvement. TR 1925.

Mr. White admitted that he was aware of a series of newspaper articles critical of the way things were being managed at Oak Ridge and expressing concern about whether the population was being adequately protected from any contamination present at the site. Mr. White admitted that he was aware, only in passing, that there were citizens groups concerned about environmental issues. Mr. White admitted that he was aware that people were concerned that their illnesses were attributable, in part or in whole, to operations at the plant. He testified that he was not aware of a specific NIOSH investigation, but did have "passing knowledge" that samples had been taken at Oak Ridge concerning pollutants or contaminants. Mr. White admitted that he was aware of a September 1997 DOE audit of safety and health at K-25 that was very critical. Mr. White stated that he had no personal knowledge that the DOE Office of Oversight had raised concerns about the condition of the buildings at K-25. Mr. White testified that he was aware that various groups made annual inspections to look at "different things" at the site. Mr. White admitted that LMES had consistently failed in self-assessment over time and that this was a problem that LMES had just recently been

⁴⁹Mr. White testified that the protective clothing was not allotted to specific individuals, but was available for general use. However, the respirators were sealed and used by only one person. TR 1911.

able to fix. TR 1930-1934, 1984.

Mr. White testified that he did not know whether or not everyone involved in the layoff of Mr. Cox knew about the citizens group and their concerns about the environment and health in Oak Ridge. Mr. White stated that he had not heard of The Exposed or the Coalition for a Healthy Environment in 1996. Mr. White testified that he did know that groups were being formed because there were some illnesses, but stated that he was not aware that employees of Oak Ridge were included. Mr. White testified that he did not know that Mr. Cox's wife was ill, although he had met her on one occasion and was aware that she employed by LMES at K-25. Mr. White testified that he read a newspaper article, after the termination notices were distributed, that included a picture of Mr. and Mrs. Cox on the front page of the paper. Mr. White testified that there were other newspaper articles that he skimmed that referenced the controversy, but they did not reference Mr. or Mrs. Cox. Mr. White testified that, at the time of the RIF, he and other managers involved in the decision had no idea that Mr. Cox was involved in the health issues. Mr. White stated that he first learned of Mr. Cox's involvement after the RIFs were issued when Mr. Stivers referenced an article in the *News Sentinel* which included a front page photo of the Coxes. Mr. White testified that he then read the article which stated that Mrs. Cox was ill and believed that the illness was associated with K-25. Mr. White testified that, to his knowledge, employees' environmental concerns had no part in the decisions as to who would be laid off. TR 1936-1938, 1949, 1952, 1964, 1965, 1992.

Mr. White testified that Brenda Tilley, manager of the security operations at K-25, went to site management on the day Mr. Cox was given the RIF notice to advise that Mrs. Cox also had been laid off. Mr. White stated that Ms. Tilley opined that it was tragic that this kind of thing was happening. He testified that he did not pursue the issue as Ms. Tilley informed him at a subsequent staff meeting that the layoff of Mrs. Cox would have no bearing on Mr. Cox's layoff and there was no action that could be taken. Mr. White testified that he did not receive e-mails or have conversations relating to the dual layoffs. TR 1955, 1956, 1958, 1959.

Mr. White testified that in August 1996 Mr. Cox was considered a K-25 employee, but was grouped with like positions at Y-12 for purposes of the layoff because the positions were transferable. Mr. White stated that captains and lieutenants were not grouped together because they were on different payrolls and it is necessary to stay within payrolls in determining layoffs. Mr. White testified that Mr. Cox was not allowed to revert to lieutenant because no bumping was permitted. Mr. White admitted that an individual was promoted shortly before the layoffs. Mr. White testified that he learned of the budget cuts "sometime in the summer." He remarked that he had not been involved in any prior layoffs. Mr. White testified that he thought that two other captains, Joe Mincey and Bill Ferrer, were laid off at the same time Mr. Cox was laid off. Mr. White testified that neither division directors nor upper management were laid off during the RIF. He added that employees who were laid off were offered and encouraged to use the company's career center. TR 1960-1962, 1988.

Mr. White testified that in reviewing the list of administrative captains that was prepared for the peer review related to the RIF it was determined that Mr. Hill was not eligible to be RIFed. Mr. Kesterson, Mr. Watkin, and Mr. Cody, all held in high regard, were determined to be eligible.

Mr. Phillips, Mr. Fouse, and Mr. Lawson were eligible and Mr. Mincey was not eligible.⁵⁰ Mr. White admitted that because administrative captains have great mobility they did not look at specific duties. Mr. White stated that, after the second RIF, there were five captains remaining including those that could not be RIFed at that point. Mr. White testified that Lee Lawson, one of the remaining administrative captains, was as good of a procedure writer as Mr. Cox. Mr. White stated that Mr. Cox could not be used in an armed capacity whereas Messrs. Phillips, Fouse, Cody, Watkin, and Lawson could have been. Mr. White testified that Mr. Cox could have applied for a medical waiver to be armed, but a waiver had to be initiated by the employee and Mr. Cox had not done so. He remarked that he was aware that waivers were granted, but had no knowledge of the company ever specifically suggesting to an employee that he pursue a waiver. Mr. White testified that Mr. Cox's medical restriction did not indicate specifically that he could not carry a gun, but was interpreted as such by Sam Thompson. Mr. White admitted that only those captains whose jobs mandated it carried a gun. Mr. White stated that he did not believe a prior felony conviction would be considered in determining a RIF. TR 1969-1971, 1981, 1982, 1990, 1991, 1995-1999.

Mr. White testified that T.J. Kesterson was the individual who had filed a whistleblower complaint that was currently pending in the Sixth Circuit Court of Appeals. Mr. White admitted that in 1991 or 1992 he had Mr. Kesterson remove application software that was licensed to the company from a computer that had been seized as evidence in a case where an employee was arrested for "child crimes." Mr. White stated that prior to that incident, LMES was taken to task by an association of software manufacturers for permitting unauthorized copies of copyrighted software to be installed on more computers than was contracted. Mr. White admitted that he, without contacting the district attorney first, had Mr. Kesterson go to the sheriff's department where he was formerly employed to try to get the software removed. Mr. White stated that Mr. Kesterson was given physical access to the computer by one without authority to do so. Mr. White testified that the incident was mentioned in Mr. Kesterson's complaint to DOE and he himself was named in the body of the complaint. He added that he was severely chastised by the director of what is now protective services, Jack Archer. Mr. White recalled that the Coxes were not mentioned in the software. TR 1972-1978, 1994.

John Blair Woods

John Blair Woods, security operations support manager, testified that his department's responsibility is to provide support to the security operations sectors at all three LMES sites. Mr. Woods stated that his functions included crime prevention, loss prevention, investigations, fitness, staff, and logistical support. Mr. Woods testified that he currently is acting manager of the protective systems department which provides the expertise on such things as intrusion detection systems and perimeter intrusion. Mr. Woods testified that there was a supervisory chain at LMES, but that he would not designate a "chain of command." TR 2040, 2041, 2043.

Mr. Woods testified that David High, the fitness staff coordinator, reports directly to him.

⁵⁰Mr. Mincey was laid off in the next RIF. TR 1971.

Mr. Woods stated that Mr. High is in charge of providing physical fitness support to the protective force chiefs and to the sector security managers. He testified that Mr. High did express concerns that some individuals should do more exercising. He acknowledged that he was aware that Mr. High did a DOE safety concern, but could not recall the exact contents of the concern. He admitted that he said that Mr. High was not a team player as he (Mr. Woods) felt that a team player is one who works with everyone involved in issue to try and come to an appropriate resolution. Mr. Woods stated that because Mr. High had a negative approach to dealing with the problems, it was building a wall between him and the protective force. He remarked that Mr. High could only resolve the problems if there was an effort to work as a team which Mr. High's negative approach precluded. TR 2044-2046.

Mr. Woods admitted that he did send Mr. High an e-mail opining that Mr. High had stepped over the line. He then spoke with Mr. High and counseled him to report problems directly to him (Mr. Woods). Mr. Woods stated that he did not tell Mr. High he could not go to DOE, but reminded him that they had previously agreed to give the supervisory chain an opportunity to work before going to DOE because the supervisors have the responsibility to resolve problems. TR 2046, 2047.

Mr. Woods admitted that in the same e-mail he cautioned Mr High not to communicate directly with anyone at DOE without providing prior notice. Mr. Woods testified that he subsequently clarified the directive explaining to Mr. High that if a DOE investigator asked him a question he could certainly answer the question, but then, because he was a member of LMES who is providing contractual support, he should report the contact to the supervisory chain. Mr. Woods stated that knowledge of the discourse would allow the organization to work in concert rather than at cross purposes. TR 2047, 2048.

Mr. Woods admitted that he had told Mr. High that he could answer an outside auditor's questions, but added that the presence of an auditor did not give him "license to talk about anything and everything that goes on in the organization." Mr. Woods admitted that he had expressed concern to Mr. High about asking a question relative to timing qualification runs. Mr. Woods stated that qualification runs were extremely important to the uniformed force because failure to qualify is a basis for termination. Mr. Woods stated that an "arbitrary decision" to measure the individual to 1,000th of a second instead of 10ths of a second did a disservice to the uniformed force by eliminating qualified people. Mr. Woods testified that Mr. High questioned the DOE auditor on that point. Mr. Woods explained that his concern was that if Mr. High needed clarification on the issue, he should have addressed it through the supervisory chain to DOE. Mr. Woods testified that Mr. High should have addressed his concern when the policy was changed, rather than waiting weeks or months until an auditor came. TR 2048-2050.

Mr. Woods testified that he did not have a problem with Mr. High going to DOE as he had a right to do, although he expected Mr. High to follow the agreed upon format before going. Mr. Woods stated that he had informed Mr. High that he "stepped over the line with your document sent directly to Hank Wunschel (DOE safeguard and security representative to the Y-12 plant) without notification or copies sent to your chain of command." Mr. Woods testified that his supervisor Mr. White told him that he could have done a better job of writing the e-mail, and Mr. Woods told him

that he would talk to Mr. High concerning what he meant to say. Mr. Woods added that since then he and Mr. High have worked hard trying to improve their interactions and progress has been made. TR 2051, 2055, 2057, 2070.

Mr. Woods testified that he was involved in the termination of Mr. Cox but did not select Mr. Cox per se for termination. He explained that although Mr. Cox reported to security at K-25, he was paid by the central administrative budget. He stated that of the unarmed administrative officers who were assigned to him, approximately five were qualified to be armed. Mr. Woods testified that in July or August of 1996, his supervisor informed him that because of the budgetary reductions he would have to reduce the number of administrative personnel by about 50%. He added that he, after a discussion with Peter White, Brenda Tilley, Bruce Hunter, and Mike Bradshaw, identified and recommended positions to be eliminated by prioritizing them. Mr. Woods testified that in his discussions with Brenda Tilley, it was found that of the three central support people who provided support at K-25, the most critical was the armorer, next the vehicle/building maintenance officer, and least critical was the procedure writer. He remarked that the layoffs were strictly based on position, individual skills were not considered. Mr. Woods stated that he did not recall sending or receiving e-mails relative to Mr. Cox's layoff. Mr. Woods testified that the layoff decision was made at levels above him and that it was probably Butch Clements who recommended that Mr. Cox be laid off. He stated that Billy Greeley, staffing specialist for protective services, came to him with the list of administrative captains being considered for layoffs and asked that he validate that he had personnel under him on the list and that it was appropriate for them to be included. Mr. Woods stated that he did recall telling Mr. Cox, when the incentive task order task team (ITO) supervised by George Cobham was winding down, that K-25 requested that he return. He explained that there was not enough work remaining for the ITO and he, Brenda Tilley, and George Cobham agreed that Mr. Cox could provide more support for Ms. Tilley than for the ITO. Mr. Woods stated that he had worked on projects with Mr. Cox. TR 2057, 2063-2068, 2071-2075.

Mr. Woods testified that three procedure writers were returned to their original locations. Mr. Woods stated that none of the three was singled out for return as it was the position, not the employee, that was being returned. Mr. Woods testified that absenteeism was a factor at all the locations and the burden is on the supervisors to monitor the attendance. Mr. Woods stated that this was not a primary function and consumed approximately 5% to 10% of the supervisors time. He added that he knew of no employee whose full time duty it was to monitor attendance. Mr. Woods admitted that there may have been a lieutenant who was solely responsible for monitoring absenteeism among the Pro Force prior to his assuming responsibility on May 1, 1996. TR 2075-2079.

James A. Thompson

James Thompson, a Y-12 senior staff engineer, worked for LMES since 1991 and left the maintenance division when he received a RIF notice in November of 1996. Mr. Thompson testified that when he was RIFed he bid on two different jobs and ultimately was hired by the waste management division. Mr. Thompson stated that he became Mrs. Cox's supervisor when the reorganization of the maintenance division took place in February of 1996. Mr. Thompson testified

that when Mrs. Cox became facility manager over the laundry, the change houses and the respirator shop, there was only one other facility operations specialist working for him. He added that the other specialist was Dennis Bolton, a facility manager for the K-1401 facility maintenance fabrication shop. Mr. Thompson testified that Mr. Bolton had more company service than Mrs. Cox and the difference in their responsibilities related to the complexity of their jobs. He explained that Mrs. Cox's position did not require extensive knowledge of the equipment in the laundry or the respirator shop. However, Mr. Bolton supervised the foot machine, carpenter, and welding shops which had equipment which required expertise and knowledge. Mr. Thompson testified that Mrs. Cox worked for him for only two weeks before being identified for the RIF on February 23. Mr. Thompson admitted that he told the DOL investigator that Mrs. Cox was selected for RIF in April. He explained that his recommendation was made on February 23, but the official selection by Mr. Dalton took place in April when Mr. Dalton made his submission to the human relations department. Mr. Thompson testified that the notifications went out about 3 days after approval by the RIF Review Board. Mr. Thompson stated that he did not read Mrs. Cox's personnel file when he selected her for the RIF

because her performance was not in question. Mr. Thompson testified that the functions that Mrs. Cox was performing were eliminated and the laundry was to be outsourced. TR 2343-2347, 2378-2381, 2438-2440; CX-110.

Mr. Thompson testified that he first became aware of the 1996 anticipated RIF in a meeting in Mr. Dalton's office, the maintenance division manager, on February 22 when the supervisors were asked to review their staffs and decide which positions could be eliminated.⁵¹ Mr. Thompson stated that, after reviewing his organization, on February 23 he recommended to Mr. Dalton that three salaried positions could be eliminated including the one held by Mrs. Cox. Mr. Thompson testified that after discussing the recommendations with Mr. Dalton, the list was affirmed. He stated that he did not discuss his recommendations with anyone other than Mr. Dalton. Mr. Thompson testified that inherent in his decision to eliminate Mrs. Cox's position was the fact that the laundry was to be outsourced in July 1996. Mr. Thompson stated that of the three individuals identified only two were RIFed as the third came under the retirement exception. He added that the RIF was delayed. Mr. Thompson testified that no one was transferred or hired to perform the duties of Mrs. Cox or Mr. Schaefer, the other individual terminated. Their duties were assigned to supervisors. TR 2347-2352, 2360.

Mr. Thompson stated that he was not aware of any involvement on the part of Mr. Schaefer in any of the environmental organizations. Mr. Thompson testified that to his knowledge Mr. Schaefer had never complained to DOE or to any manager concerning safety practices at Oak Ridge. Mr. Thompson stated that Charles Sweet was the third employee identified for reduction. He was terminated during a subsequent RIF. Mr. Thompson testified that he was not aware of any involvement on Mr. Sweet's part in any organization addressing health concerns at Oak Ridge nor did he know of any complaints Mr. Sweet made to DOE or to management bypassing Mr. Thompson. TR 2353.

⁵¹Mr. Dalton was supervised by Mr. Simon. TR 2348.

Mr. Thompson testified that he became aware of Mrs. Cox's medical problems on May 1, 1996 when he was requested by the industrial hygiene department to schedule a meeting with her. Mr. Thompson stated that he attended the meeting with Mrs. Cox and the health physics representative from industrial hygiene. Mr. Thompson testified that in the meeting he reviewed the results of Mrs. Cox's tests and medical reports finding an elevated level of cyanide which at that time was from an unknown source. Mr. Thompson stated that subsequently he learned that Mrs. Cox thought that her problems were related to her work. Industrial hygiene then placed an air monitor on Mrs. Cox to monitor her work area. TR 2353-2356.

Mr. Thompson testified that he attended a meeting, called by Fred Mynatt, of individuals who felt they were exposed to contaminants at work. Mr. Thompson stated that he could not recall the date, but knew that the meeting occurred after the session with Mrs. Cox and the industrial hygiene representative. This was the only meeting he attended that related to cyanide and was the first time he learned of Mrs. Cox's involvement in the Coalition for a Healthy Environment. The meeting was called to address the actions Mr. Mynatt had taken relative to the cyanide problems. Mr. Thompson stated that he was representing Mr. Dalton at the meeting held at the Eppler Center in Oliver Springs, Tennessee. He did not recall seeing Mr. Conner at that meeting. Mr. Thompson stated that he did not discuss with Mr. Dalton the assertions of Mrs. Cox that her medical problems emanated from her work environment. Mr. Thompson testified that Mrs. Cox went out on short-term sometime in November. He remarked that he never felt any animosity towards Mrs. Cox. TR 2356-2358, 2371, 2372, 2385, 2386.

Mr. Thompson testified that the RIF which included the employees designated in February of 1996 was ultimately implemented in August of 1996. Mr. Thompson stated that he received the layoff packages August 26, 1996 whereupon he notified Mr. Schaefer and Mrs. Cox. Mr. Thompson testified that he has never discussed a RIF with an employee prior to learning that they were to be officially notified because it is company policy not to discuss possible terminations until the reductions actually take place. Mr. Thompson testified that he himself had not been made aware of his termination prior to receiving official notification. He stated that as Mrs. Cox's supervisor he was responsible for giving her the RIF notice. Mr. Thompson testified that he was instructed to call employees into his office and present them with the notice. Those off for the day or on short-term disability the day the notice was to be presented were to be called at home with a witness present. At the time Mrs. Cox was notified that her position was being abolished, Mr. Thompson stated that he was not aware of any policy concerning whether individuals on short-term disability should be RIFed. He added that he learned subsequently that those on short-term disability would be given a notice and when released to return to work the termination became effective. Therefore, he did not violate company policy in notifying Mrs. Cox of the RIF, but he was not aware of the proper procedure until later. Mr. Thompson stated that going from short-term to long-term disability proceeds irrespective of a RIF notice. Mr. Thompson testified that Mrs. Cox was currently in long-term status and would be terminated when released to return to work. TR 2358, 2359, 2361, 2362, 2397, 2422, 2423.

Mr. Thompson testified that he understood that individuals at K-25 were sick, but did not know the cause of the illnesses. He added that he had never heard Mr. Dalton comment on whether

the claims of illnesses related to employment at Oak Ridge were legitimate or not. Mr. Thompson stated that Mr. Dalton provided the supervisors with information about the results of investigations during staff meetings. He added that he believed Mrs. Cox was ill. Mr. Thompson stated that he had never heard any other manager, or anyone in an official position, make a statement suggesting that the employees' illnesses were not related to working at Oak Ridge. TR 2362-2364.

Mr. Thompson testified that Randy Burnett, an engineering manager, was on the phone when he called Mrs. Cox to advise of her termination. He admitted that he did inform Mrs. Cox that someone else was on the line as a witness. He added that written company policy mandated that there be a witness to the notification call. Mr. Thompson stated that a training tape was used to educate the managers on the correct procedure for presentation of termination notices. He testified that in the phone conversation he informed Mrs. Cox that she would receive a package by certified mail which

should be signed and returned. Mr. Thompson stated that when Mrs. Cox did not sign and return the documents within 10-15 days he called her and she then complied. TR 2430, 2432, 2433.

Mr. Thompson testified that when he notified Mrs. Cox of the termination she inquired into the cause. He explained that he informed Mrs. Cox that her position was eliminated because of staff cuts to reduce overhead. He added that it was only in a subsequent conversation that Mrs. Cox asked if she was being laid off because she was sick. Mr. Thompson stated that it was also in a subsequent conversation that Mrs. Cox inquired if she could bump another supervisor. He informed Mrs. Cox that bumping was not allowed for salaried supervisors. Subsequent to notifying Mrs. Cox of the RIF, Mr. Thompson testified that he learned of her assertions that she had been placed in the position to be RIFed. He stated that the fact that Mr. Cox was RIFed had no bearing on his decision to RIF Mrs. Cox. Mr. Thompson stated that whether a person is or is not on disability the selection process for a RIF is the same. Mr. Thompson explained that the only difference is at the end of the notice period instead of being terminated they remain in the appropriate disability status. Mr. Thompson stated that he did not know of any reason why Mrs. Cox's disability payments would be affected by her selection for a RIF. TR 2364-2367, 2424, 2425, 2435.

Mr. Thompson testified that in February 1996 he had 15 salaried employees which now has been reduced to three. TR 2368.

Mr. Thompson testified that he met Mr. Cox on one occasion prior to the RIF when Mrs. Cox was going on short-term disability and Mr. Cox came to the office to pick up papers for her. Mr. Thompson stated that he was aware that Mrs. Cox was married, but that he did not know that her husband worked for the company. Mr. Thompson stated that there were no concerns or activities related to Mr. Cox that affected the decision to RIF Mrs. Cox. He stated that he was not aware that Mrs. Cox was involved in a group called the Coalition for a Healthy Environment (CHE) until he went to a meeting held after the May 1 industrial hygiene meeting. It was at this meeting that he first learned of the cyanide issues. Mr. Thompson testified that he learned of Mrs. Cox's involvement long after her position was targeted for elimination February 23. TR 2369-2373.

Mr. Thompson admitted that he did see Mrs. Cox on television, but did not recall what she said, although he was aware that it related to the cyanide issues. He added that he could not recall the date, but that it was after May. Mr. Thompson testified that he could not recall joking with Mrs. Cox and using the words “publicity” or “movie stars” relative to her being on the news. Mr. Thompson admitted that he told a Department of Labor (DOL) investigator that nothing about Mrs. Cox’s health, and nothing about the publicity, had anything to do with her reduction. TR 2387-2389, 2392.

Mr. Thompson testified that he first learned that the positions he had recommended for elimination were to be followed when Mr. Dalton sent a letter to the human relations department in early March including the recommendations with an order to proceed. Mr. Thompson stated that he was shown the letter by Mr. Dalton’s administrative assistant. TR 2406, 2407; CX-114.

Mr. Thompson testified that a document which compares all employees in a competitive area relative to time in grade, time in job, performance, and age was filled out by the administrative assistant to Mr. Dalton. Mr. Thompson stated that this document lists all of the factors that go into the final decision by the RIF Review Board. He explained that, although Mr. Bolton was not RIFed at the same time as Mrs. Cox, his name was on the same form because take all the comparable positions in the division are placed in the same comparison group. Mr. Thompson stated that this form dated April 15, 1996 without a signature by the RIF Review Board chair indicated that the recommendation concerning Mrs. Cox had gone to them in April. Mr. Thompson stated that a subsequent document was the same form after review by the RIF Review Board which then included the signature of the board’s chair. TR 2407-2409; CX-115, CX-116, CX-114.

Mr. Thompson testified that when he received a medical incident report he discussed it with the employee and, if the safety department was not conducting an investigation, he would conduct his own investigation with the employee to determine what happened and if anything could be done to keep it from reoccurring. Mr. Thompson stated that he did not receive a call from the company nurse when a medical incident report was filed unless there were restrictions that then applied to the employee. Mr. Thompson stated that he did not know whether Mrs. Cox filed a medical incident report. TR 2410-2411, 2414.

Mr. Thompson testified that he received and distributed information on the cyanide issue that was provided by Mr. Dalton in his staff meetings. He stated that the information included the numbers of people expressing concerns. TR 2415, 2416.

Mr. Thompson testified that he questioned a document which was presented to him by an employee who stated that it came from John Stewart. Mr. Thompson stated that the employee expressed an opinion that he had some of the problems referred to in the document. Mr. Thompson stated he did ultimately distribute the document after Mr. Stewart validated it. Mr. Thompson testified that he tried to distribute only information that came through the management chain. TR 2418, 2419.

Mr. Thompson testified that the laundry which Mrs. Cox supervised was susceptible to

radiation contamination because it cleaned contaminated clothing. He explained that there were areas in the laundry that were posted as contaminated which necessitated anti-contamination clothing. Mr. Thompson testified that the area is monitored by health physics radcon technicians to determine contamination levels and requirements for protection. Mr. Thompson stated that he had not heard that DOE thought that the monitoring was inadequate. TR 2382, 2383.

Mr. Thompson testified that there was no time that he was off the LMES payroll between his being RIFed in maintenance and assuming a position with the waste management division. He explained that he bid on the position by submitting a copy of his resume to the selecting manager. Mr. Thompson testified that Mr. Dalton did not notify him of the position, but did write a recommendation when requested. He added that he would have given Mrs. Cox a recommendation if she had requested one. Mr. Thompson testified that to his knowledge Mrs. Cox had not bid on any position after her RIF notification. Mr. Thompson stated that one could learn of open positions at the plant by postings which could be copied for someone who was out. The internet site "Inside Energy Systems" could also be accessed to identify open positions. In addition, one who was out could call the plant and receive information on the job openings. TR 2428, 2429, 2443-2445.

James Stanley Dalton

James Dalton, manager of the maintenance division, has worked for LMES for 29 years. Mr. Dalton stated that he has been in the maintenance division since February 1, 1994. TR 2453.

Mr. Dalton testified that Mrs. Cox, one of the maintenance supervisors, was placed on decision making leave, a disciplinary action, in the late summer or early fall of 1994. Mr. Dalton explained that this action was taken because Mrs. Cox violated company procedure when she removed some business sensitive salary data from her supervisor's desk and distributed it to her peers. He stated that Mrs. Cox came to speak to him after she received the disciplinary action, and told him that things were happening and people were saying things about her because they found out about the action. Mr. Dalton testified that he recommended that she speak to the Affirmative Action and Equal Employment Opportunity (AAEEO) representative. Mr. Dalton stated that he did not have a conversation with Mack Wilson or anyone else concerning the disciplinary action. He told Mrs. Cox that people often "put two and two together and come up with the right answer." Mr. Dalton stated that the fact of the disciplinary leave and the fact that she spoke to him concerning it did not effect the decision to RIF her. Mr. Dalton testified that the record of the disciplinary action would have been retained in her file for a year and then destroyed. Mr. Dalton stated that Mrs. Cox spoke to him prior to her disciplinary action when she and her supervisor were having some problems. TR 2453-2455, 2592-2594, 2621, 2622.

Mr. Dalton testified that from the time he became division manager in 1994, and through 1995, he was aware that Mrs. Cox was absent because her husband was ill, some of her family members passed away, her son had problems, and for personal matters. Mr. Dalton stated that any personal leave beyond 80 hours a years had to have special approval if the employee was to be paid for the time. He added that he did request payment for an additional 40 hours from the vice president and approved a donation of vacation time by other employees for Mrs. Cox. Mr. Dalton testified that

he had to initiate and sign all requests for such donations. He stated that the time Mrs. Cox took off to attend to family problems was not a factor in the RIF division. TR 2456-2458, 2426.

Mr. Dalton testified that he submitted a promotion application for Mrs. Cox in early 1995, and she was promoted from a laundry supervisor to a facility operations specialist. Mr. Dalton testified that as a facility specialist Mrs. Cox's duties required her to supervise the basic upkeep of the building. Mr. Dalton stated that prior to the establishment of the position of facility specialist in 1992 a supervisor generally was appointed to be responsible for the buildings. TR 2456, 2459, 2460.

Mr. Dalton testified that in mid to late February of 1996, the issue of reduction within the maintenance division of K-25 arose. Mr. Dalton stated that at that time the site manager, Harold Conner, called his staff together and informed them that because of DOE budget cuts a self-evaluation of each division had to be made looking at positions that could be eliminated that would least impact the operations of the site. Mr. Dalton testified that he met with his department managers, explained the charge, and asked that they identify positions to be reduced using the company guidelines. He stated that Mrs. Cox's name was included in a list to be RIFed by Mr. Thompson. He added that he told his staff that they would meet again in a day or two and formulate a list for the RIF from the positions identified in each area. Mr. Dalton testified that when they reconvened everyone in the group looked at all the recommendations for reduction. He explained that the form for the self-assessment included the function or position identified as a potential candidate for downsizing, the incumbent's name, the workload, and the estimated cost savings of eliminating the position. Mr. Dalton stated that the document, which was developed by his office, was dated March 4, 1996. He added that Mrs. Cox was identified in the document. Mr. Dalton stated that a document dated April 15, 1996, which identified 83 potential candidates for elimination from the maintenance division, was prepared with the help of his department managers. Mr. Dalton testified that there was no discussion concerning Mrs. Cox that was any different from any other employee to be RIFed. He explained that he received notice from Harold Conner in April or early May that the layoff would not occur that spring at K-25 because DOE was adjusting funding and everything was on hold. TR 2462-2469, 2577, 2614; CX-116, RX-7.

Mr. Dalton testified that the issue of layoffs arose in late July or August of 1996 when Harold Conner notified him that they were to proceed. He stated that at that time the list submitted in the spring was downsized because some money had been found. The list was then submitted through the human resources representative to the RIF Review Board which had the authority to recommend changes to the list. Mr. Dalton testified that peer comparison sheets were prepared for employees performing similar jobs and were reviewed by the Review Board looking at criteria such as time in grade, company service, and performance appraisals. He stated that the chairman of the Review Board was Cleve Jones, the director of human resources, and the board included Hernistine Every, the human resource representative for protective services; someone from labor relations, probably Sandy Davis; Walt Ghoston from the Affirmative Action Equal Opportunity group; Horace Norman from central staffing group; and one or two others that he could not recall. Mr. Dalton testified that no one dissented to the selection of Mrs. Cox's position or Mrs. Cox as an individual for removal. He added that all members of the Review Board were required to sign the sheet. In referring to the comparison sheet listing Mrs. Cox and Mr. Bolton, Mr. Dalton testified that the date at the upper

right hand corner August 6, 1996 was the date it was prepared and signed by him before it went to the Review Board. He explained that the next review board, a much smaller board which reviewed the layoffs within two weeks of the first board, was chaired by Mack Wilson vice-president of human relations and included a representative of the legal department, Hernistine Every, and himself. Mr. Dalton stated that he could not recall any discussion concerning the elimination of Mrs. Cox's position or Mrs. Cox personally. Mr. Dalton testified that approval of the selections for layoff was shown by signing the comparison sheet. Mr. Dalton stated that the final review was made by the president of the company. Mr. Dalton testified that he was aware that Mrs. Cox was on short-term disability at this time, but that it did not affect the process of selection for the RIF. TR 2469-2478, 2480-2482, 2494; RX-8, CX-114.

Mr. Dalton testified that Mrs. Cox was a consistent constantly meets (CM) performer whereas Mr. Bolton had one CM and two distinguished services (DS). Mr. Dalton stated that DS is the highest performance rating at LMES whereas CM is about the average rating.⁵² Mr. Dalton testified that Mr. Bolton, a level six facility specialist, had twenty-one years of company service and Mrs. Cox, a level three facility specialist, had nineteen years. Mr. Dalton stated that Mr. Bolton was responsible for the K-1401 building which was a large machine maintenance building with sheet metal, machine, carpenter, and weld shops within it. Mr. Dalton testified that Mrs. Cox was responsible for the smaller buildings 1008A, B, C, and probably D which were primarily change buildings with a couple of maintenance shops included. Mr. Dalton stated that there was considerably more responsibility in Mr. Bolton's area as machinery, heating and ventilating systems were involved. Mr. Dalton testified that he did not feel that Mr. Bolton and Mrs. Cox were equally qualified because they did not have the same training and Mr. Bolton worked as a "craft supervisor" and had more experience in the building itself. TR 2478-2480, 2618, 2619.

Mr. Dalton testified that he received word that the individuals selected for RIF were to be notified approximately two weeks after the second review board met. He stated that there was a one hour training session on how to contact employees and present their RIF notices. He added that it was somewhere in that time frame that he was informed that those over fifty with ten years of company service could not be included in the August RIF. Mr. Dalton stated that Mr. Bolton was over fifty and Mrs. Cox was under fifty. Mr. Dalton testified that the division managers were given packages of letters addressed to each individual to be noticed. He stated that he did not recall bumping ever being used in the salaried ranks. TR 2482-2485.

Mr. Dalton testified that he first learned of Mrs. Cox's belief that an occupational exposure was affecting her health when she called him after receiving her layoff notice, and inquired if she was laid off because of her involvement in the cyanide group. Mr. Dalton stated that her involvement in the group and her claim of exposure had nothing to do with her RIF. He acknowledged that he knew Mr. Cox, but that nothing Mr. Dalton or Mr. Cox said or did had anything to do with Mrs. Cox being RIFed. He stated that he did not know of any involvement by Mr. Cox in any of the cyanide groups until after the RIF notices were distributed. He added that he had no occasion to discuss anything

⁵²Mr. Dalton testified that there is a step between CM and DS called consistently exceeds (CX). TR 2478.

about Mr. Cox's employment with him before August 26, 1996. TR 2485, 2486, 2491, 2492.

Mr. Dalton testified that he supervised the laundry which cleaned contaminated and uncontaminated clothing separately. Mr. Dalton testified that the clothing would be tested by health physics personnel and, if it did not exceed certain limits, it was allowed to be used in contaminated areas. Mr. Dalton stated that laundry personnel wore protective garments as mandated by the health physics technicians which could include shoe scuffs, aprons, and gloves. He acknowledged that there was no determination made as to the level of contamination before the clothing reached the laundry.

He stated that individuals were required to monitor themselves and their clothing at boundary control stations. TR 2486-2490.

Mr. Dalton testified that at the end of 1994 he had approximately 617 people in his division and now had only 316. TR 2518-25.

Mr. Dalton testified that the fact that Mrs. Cox was on short-term disability had no effect on her RIF notice. Mr. Dalton stated that a memorandum received in December was simply a notification that Mrs. Cox was going from short-term to long-term disability which had no effect on her RIF notice which would not be implemented until she was removed from the long-term disability category. He stated that the letter informing Mrs. Cox that she was going from short-term to long term disability was a standard letter. Mr. Dalton testified that company policy dictates that employees be informed of a RIF as soon as possible even if they are on disability leave. He stated that there was no difference in company policy when selecting an individual for a RIF because they are on disability status. Mr. Dalton testified that he, his administrative assistant, and other department managers knew that Mrs. Cox was on disability when they discussed her RIF. TR 2522-2525, 2530-2532, 2534-2443; CX-262.

Mr. Dalton testified that there is a placement office onsite to assist displaced workers. He stated that he would not directly assist Mrs. Cox in finding a new job, but would write a recommendation for her if she sought employment with another company. TR 2546.

Mr. Dalton testified that the only cyanide meeting he attended was one held by the site manager in March of 1997 which all employees had an opportunity to attend. Mr. Dalton stated that the two video cameras in the auditorium where the meeting was held have been in place for about 15 years. TR 2548-2550.

Mr. Dalton testified that he had never discussed the cyanide issue privately with Harold Conner, but that the issue of employee concern about cyanide exposure had arisen infrequently at the daily meetings of about 30 managers which Mr. Conner conducted. He stated that he never discussed Mrs. Cox's participation in cyanide meetings with Mr. Conner. Mr. Dalton stated that he thought the health and safety managers and the public relations managers spent a lot of time on the cyanide issue. TR 2626.

Mr. Dalton testified that the fact that some employees believed that the relining of the sewers

at K-25 by Instituform, a subcontractor, was causing illnesses was discussed at one or two of the daily meetings with Harold Conner. Mr. Dalton admitted that the newspaper article on this issue was an embarrassment to LMES. He admitted that LMES did not like negative publicity any more than any other company. Mr. Dalton testified that a newspaper article about the testing for cyanide at K-25 did not prompt him to inquire personally as he knew that issue was already being investigated. He stated that he did not discuss the article with other managers. Mr. Dalton testified that he did not discuss a newspaper column about the incinerator at K-25 with anyone at the site. He added that employees were allowed to post newspaper articles on bulletin boards at the site even if they were negative toward LMES as long as they were not racist or sexist or the like. Mr. Dalton admitted that he had read a newspaper article concerning workers being housed in a building at X-10 that was contaminated, but added that he had not worked at X-10 and had never heard the situation discussed. Mr. Dalton admitted that there were times when people were moved due to concern about exposure to contaminants. Mr. Dalton testified that he had never heard any discussion about moving workers from the K-25 site because it was contaminated. TR 2560-2571; CX-20, CX-21, CX-89, CX-254.

Mr. Dalton admitted that the layoff of Mrs. Cox was approved August 6, 1996, but added that it had been decided in February of 1996. Mr. Dalton admitted that the federal budget, and therefore the LMES budget, is not finalized until around August. He admitted that no review board was asked to consider the layoff of Mrs. Cox until August. Mr. Dalton admitted that as of August 6, 1996 there were still some steps remaining before the final decision to RIF Mrs. Cox was made. Mr. Dalton admitted that at previous times he had planned layoffs that were delayed. Mr. Dalton testified that there was nothing unusual about the RIF procedure involving Mrs. Cox. Mr. Dalton stated that to his knowledge the legal department reviewed all RIFs. TR 2573, 2574, 2584, 2589, 2591.

Mr. Dalton testified that he had never seen Mrs. Cox on television. He added that he did not recall hearing anything indirectly about Mrs. Cox appearing on television. TR 2596, 2597.

Mr. Dalton testified that Mrs. Cox may have come to his office to express concerns about the laundry as she was in his office several times to talk about "things." However, he stated that he did not recall Mrs. Cox putting a logbook on his desk and requesting that he read portions. TR 2596, 2599.

Mr. Dalton testified that the layoff comparison form went from his department to the first review board. Mr. Dalton stated that the layoff comparison form dated April 15, 1996 was prepared early and referenced the scheduled layoff date as "to be determined" (TBD). Mr. Dalton testified that sometime there are documents proposing layoffs with dates of "to be determined" when the employees are still working. Mr. Dalton pointed out that the date on the document across from his signature was April 15, 1996. Mr. Dalton testified that in contrast the comparison form dated with the layoff date of October 11, 1996 was signed by the first review board. Mr. Dalton stated that he did not know why there was no block for the second review board to sign. Mr. Dalton testified that because there was no place for the second review board to sign, someone wrote "OK" next to Mrs. Cox's name. Mr. Dalton stated once the actual layoffs took place, the paperwork for those not actually RIFed in August was probably destroyed. Mr. Dalton testified that approximately 70 or 80 employees were selected for RIF in February of 1996 and about 30 received RIF notices in August.

TR 2605-2607, 2609-2611; CX-114, CX-115.

Mr. Dalton testified that it is company policy to answer auditor's questions truthfully and honestly and not to get into a dialogue about the answers or volunteer anything. TR 2612, 2613.

Mr. Dalton testified that there were occasions when after a person received a RIF notice that additional money was obtained and the RIF was withdrawn. He stated that he was not aware of the mechanics of such a withdrawal. Mr. Dalton testified that he was not aware that Mrs. Cox was ever notified that her RIF was vacated. He explained that if a RIF was withdrawn the employee would be notified in writing. Mr. Dalton testified that after he was RIFed Mr. Thompson found employment elsewhere in the company, but this did not alter the fact that he was RIFed from the maintenance department. Mr. Dalton stated Mr. Thompson received a sixty day notice and at the end of the sixty days he transferred to Y-12. Mr. Dalton thus left the K-25 payroll, but remained on the LMES payroll. TR 2615-2617.

Mr. Dalton testified that a day or two after the RIF notices were issued, Brenda Tilley came and inquired if he was aware that Mr. Cox had also received a RIF notice. Mr. Dalton advised Ms. Tilley that he was not aware of that situation. He added that he and Ms. Tilley then informed Mr. Conner of the dual layoff. Mr. Dalton stated that apparently someone raised the issue to Mr. Jones and that precipitated his memo to Mr. Wilson. He testified that his office was contacted by Mr. Jones and asked to provide background information and any other relevant information concerning the dual layoff. Mr. Dalton stated that he did not know who initiated the inquiry. TR 2631-2633.

Brenda Tilley

Brenda Tilley, security sector manager at K-25, testified that she had been employed at K-25 for about twenty years. Ms. Tilley testified that she has known Mr. Cox for about twelve years and had been his indirect supervisor from July 1996 until his termination in October 1996. She stated she knew Mr. Cox's wife worked in maintenance and on occasion spoke to her when security needed something from maintenance. TR 2634-2636.

Ms. Tilley testified that in October 1993 the protective services was centralized and Mr. Cox was transferred to the Y-12 plant to be an administrative captain. She added that subsequently under a reorganization plan in May 1996 some of the functions were returned to the sites. Ms. Tilley testified that Mr. Cox was not to return to the site until October 1996 as he was working on a special assignment, called an incentive task order (ITO). She stated that she told John Woods and George Cobham that after Mr. Cox completed the ITO there would be work for him at K-25. Ms. Tilley added that Mr. Cox's primary function, when he did return to K-25, was as a procedure writer. She testified that Mr. Cox also worked on a new absentee program which consumed about ten percent of his time and also helped in safety and QA. TR 2636-2639.

Ms. Tilley testified that the direction for a RIF came from Harold Conner, the site manager, through Butch Clements, the division head, and her immediate supervisor, Peter White. Ms. Tilley

stated that although she told management that her department could not sustain any cuts, she was forced to determine which cuts would have the least impact on the protective force organization. Ms. Tilley testified that she, Sam Thompson, Peter White, and John Woods determined that the loss of the procedure writer would have the least impact. Ms. Tilley stated that she was aware that Mr. Cox held the position of procedure writer and would be the one on the peer review list for possible termination. Ms. Tilley testified that she was not involved in the process of selecting individuals for layoff from the peer review group. Ms. Tilley stated that the positions of shift commander, operations officer, vehicle and maintenance officer, scheduling officer, and armorer were determined to be more essential. Ms. Tilley testified that the discussions took place in late June through July. When her list was finalized she contacted a staffing specialist to get the positions and the names to go through the peer review. She stated that after her decision was made on what positions could be eliminated, the list then went to the staffing specialist who participated with the division manager and others in the peer reviews. Ms. Tilley testified that she was notified that Mr. Cox was to be RIFed only a day or two before he was given his layoff notice. She stated that she, Peter White, and Sam Thompson were present when Mr. Cox was given his notice. Ms. Tilley added that Mr. White was at her office for a meeting and asked if she would like him to stay because this was the first layoff notice she delivered. Ms. Tilley testified that when Mr. Cox received his notice he stated that his wife also had been RIFed. She added that Mr. Cox asked several questions as to why he was chosen for the RIF, why he could not be bumped back to lieutenant, and what was the relevance of an unarmed position to his selection for RIF. Ms. Tilley testified that not long after the layoff notices were distributed, Mr. Cox stated that he thought that the layoff was a way of getting back at Mrs. Cox. Ms. Tilley added that she ultimately eliminated nine employees. TR 2639-2644, 2652, 2653, 2680-2682.

Ms. Tilley testified that Sam Thompson and Peter White both indicated that they were not aware that Mrs. Cox had been laid off. She added that she only became aware of Mrs. Cox's layoff at the meeting with Mr. Cox. Ms. Tilley testified that she told Jim Dalton, Mrs. Cox's division manager, that she was going to speak with Mr. Conner to see if there was anything that could be done about the dual layoff. Ms. Tilley stated that Mr. Conner told her that he was not aware that both Coxes were laid off, but that he would see if anything could be done. Ms. Tilley testified that in a subsequent conversation with Mr. Conner she was told that there was nothing that could be done because of the budget cuts. She stated that she did not discern any desire to purposely include Mr. Cox in the RIF nor did she know of any animus toward him. Ms. Tilley testified that initially she was surprised by the layoff of Mr. Cox because of his tenure, but later learned that the same thing occurred all across K-25. TR 2647-2650.

Ms. Tilley testified that currently there is not a great need for procedures to be written, and what is necessary is done as a joint process by herself, the chief, or one of the shift commanders. She added that the absentee control function is also currently a joint effort. TR 2654, 2655.

Ms. Tilley testified that she could not be sure of when she first learned that Mrs. Cox was involved in a group raising concerns about the K-25 plant and contamination. She added that it did take place after Mr. Cox returned to K-25 and, therefore, after he was selected for the RIF. Ms. Tilley testified that at some point after she learned that Mrs. Cox was involved in a group raising

concerns, Mr. Cox told her that one of the groups wanted him to be a moderator at a meeting. Ms. Tilley stated that her husband, who also works at K-25, was experiencing some of the same symptoms as Mrs. Cox and she had discussed in some detail the doctors and tests. Ms. Tilley testified that her husband had numerous tests done and also spoke to doctors who were at the K-25 site from Cincinnati, but no diagnosis was ever made. She stated that her husband had never expressed any concerns about

making statements that his medical problems were associated with Oak Ridge. TR 2655-2658, 2672, 2673, 2683.

Ms. Tilley testified that the fact of employees raising concerns about toxic exposure was discussed among the managers. Ms. Tilley testified that she had heard that some managers at Oak Ridge did not like employees to go outside the chain of command. Ms. Tilley stated that she had cautioned Bruce Hunter when he began work K-25 that the company had an open door policy and that he could not prevent employees from going outside the chain of command. She stated that she cautioned Mr. Hunter because he had come to K-25 from the military and might not understand LMES policies and procedures. Ms. Tilley stated that after she warned Mr. Hunter she was not aware of his violating the policy. TR 2662, 2670-2672.

Ms. Tilley testified that she did remember seeing newspaper articles concerning the cyanide issues, but did not remember seeing the Coxes mentioned in the articles. She stated that she did remember seeing a photo of the Coxes in the newspaper after they left the LMES payroll, but did not recall seeing any newspaper articles prior to the decision to RIF Mr. Cox. TR 2674, 2675.

Ms. Tilley testified that she had received training on how to notify employees who were being RIFed. She explained that the training did not distinguish between employees who were on disability and those who were working. She stated that employees could not be removed from the payroll while on disability, but could be notified of being selected for RIF. TR 2676, 2677.

Harold T. Conner, Jr.

Harold Conner, vice president of environmental management and enrichment facilities for LMES, testified that he has been employed by LMES for thirty-four years. Mr. Conner stated that his office is located at the K-25 site. He testified that in 1995 he first became aware that some employees were claiming illness due to exposure to cyanide when Sherrie Farver and Ann Orick discussed their concerns on this issue. Mr. Conner stated that he told Ms. Farver and Ms. Orick that he would try to discover if there was a problem in their workplace by sampling and testing. He testified that several thousand air, water, and soil samples were taken and results showed no evidence of cyanide above permissible limits. Mr. Conner stated that later samples were tested for other toxic substances such as heavy metals. Mr. Conner explained that the industrial hygiene department conducted the tests, and the data was reviewed by the University of Alabama. Mr. Conner stated that the University of Alabama was suggested by David Milan, the health and safety representative at the site, because that facility known to the industrial hygiene staff and was under contract to LMES. Mr. Conner testified that the close-out session with the University was a public meeting. He added that

the results of the testing was public record. Mr. Conner testified that although the results were negative for cyanide, Ms. Farver and Ms. Orick continued to have concerns. TR 2781, 2786-2791, 2798, 2799.

Mr. Conner testified that in early 1996 the company thought it was handling the issues as well and did not act on the K-25 employees' request to get NIOSH involved in the study. Mr. Conner admitted that upon request of the employees NIOSH came to the site and did its own testing. He testified that he cooperated with NIOSH including setting up a team of people to work with the NIOSH representative, Leo Blade, to assist him. Mr. Conner stated that employees were made available to speak with Mr. Blade and his staff. Mr. Conner admitted that the employees took issue with the conclusions of NIOSH that there were no impermissible levels of cyanide at K-25. He stated that he thought the employees were disappointed with the report, and his concern was that there was still no closure of the exposure issue. Mr. Conner stated that he had never heard anyone in a supervisory position state that an excess of time or money was being spent to determine whether there were pollutants at K-25. Mr. Conner stated that he had never heard any statement that the claims of the employees lacked legitimacy. He added that no one would have made such comment to him as everyone knew how committed he was to finding out the condition of the site. TR 2799, 2800, 2803, 2868-2870.

Mr. Conner testified that the governor of Tennessee appointed a panel to look into the cyanide issue at K-25 in May-June 1996. Dr. Frank Parker was appointed by the governor to lead the team of experts to evaluate the problem. He testified that the company was asked to provide a wealth of information and that he made the initial presentation to the panel. Mr. Conner stated that the panel's meetings were public and allowed employees to express their concerns. He testified that a draft report, not the final report, was issued in early December of 1997. TR 2816-2818; RX-22.

Mr. Conner testified that the company provided employees with medical examinations by two physicians, Dr. Lockey chosen by the company and Dr. Byrd chosen by the employees. Mr. Conner stated that no restraints were placed on the doctors. As of yet they had not submitted their final report. He explained that the plan was for Drs. Lockey and Byrd to brief both the company and the employees on the results. Mr. Conner admitted that there is employee frustration because Drs. Lockey and Byrd have not yet submitted a report. Mr. Conner testified that he had never heard it said in any meetings that the delay in the issuance of the findings of Drs. Lockey and Byrd was to extend the process so that the statute of limitations related to the workers' claims would expire. Mr. Conner stated that, in addition, some employees were interviewed and examined by Dr. Edelman of Vanderbilt University Medical Center. Mr. Conner testified that the results of Dr. Edelman's tests were inconclusive. TR 2800, 2801, 2808, 2809, 2852, 2892.

Mr. Conner testified that NIOSH conducted a close-out meeting, which he attended, during June or July 1996. Mr. Conner stated that there were several health and safety professionals in attendance, as was Dr. Mynatt. Mr. Conner testified that there were cameras at the meeting, but they belonged to the television stations in attendance. He stated that he has never seen a videotape of the meeting. Mr. Conner testified that he knew both from his presence and, after reviewing the tape of the meeting, the identity of those raising concerns. He admitted that at that time he was already

acquainted with many of the employees who had expressed concerns as he had established a cyanide working group. Mr. Conner testified that after the results of the initial testing by industrial hygiene and the University of Alabama found that the correct testing methods were being used but that procedures could be improved, he advised that he was going to set up a group where health and safety professionals, himself as representative of the site management, and employees could take a "hard look at the information". The group would then make recommendations that would help in the evaluation of the problem. Mr. Conner admitted that he believed that there was a lack of trust on the part of the employees with what the company was attempting to do. He added that he was attempting to establish a mechanism where everyone could freely express their views and concerns. Mr. Conner testified that all of the employees with concerns were part of the cyanide working group. He stated that but he worked most closely with Ann Walzer, as representative of the employees, to formulate a list of recommendations. Mr. Conner stated that Ms. Walzer, who worked in environmental compliance at K-25, received a termination notice which he requested be extended to allow her to complete her work with the working group.⁵³ Mr. Conner testified that because she was a toxicologist by training he felt she could be instrumental in coming to some conclusions. Mr. Conner stated that he did not know that Mrs. Walzer had filed a United States Department of Labor whistleblower complaint when he extended her layoff. Mr. Conner stated that the principal points of the recommendations developed included having other experts involved in the study. This proposal led to the two physicians, Dr. Lockey and Dr. Byrd, being employed. Mr. Conner admitted that the recommendation to administer urine thiocyanate tests was considered by the president and vice president of compliance, but the sampling protocol was rejected after a study was done to evaluate the benefit of such testing. TR 2801-2805, 2807, 2863, 2864, 2876, 2877, 2889; CX-257B.

Mr. Conner testified that it did come to his attention that Dr. Oesch, a member of the medical department at K-25, thought that there was a basis for the cyanide concerns. He stated that Dr. Oesch has had a concern about cyanide in the world and had studied a cyanide problem at a previous job. Mr. Conner testified that Dr. Oesch came to him in early 1996 to share his concern that the potential for cyanide intoxication and related health problems be communicated to everyone at K-25 and in the Oak Ridge area. Mr. Conner admitted that he was aware that the medical department had instructed Dr. Oesch not to treat anyone for cyanide intoxication. TR 2792, 2793.

Mr. Conner testified that in February-March of 1996 he, Dr. Oesch, and others presented several information sessions on the closed circuit video system discussing the cyanide issue and what the company was trying to do to resolve the issue. Mr. Conner stated that no restraint was imposed on Dr. Oesch during these sessions. He explained that the sessions were initiated to communicate to the employees that the company was aware that there was concern about possible cyanide exposure. TR 2796, 2797.

Mr. Conner testified that the concerns later came to focus on the Toxic Substances Control Act (TSCA) incinerator at K-25. Mr. Conner stated that the incinerator was used primarily to burn polychlorinated biphenyls (PCBs) with small amounts of radioactive elements. He testified that the

⁵³Mr. Conner noted that Ms. Walzer did find a position in the HAZWRAP organization of the company where she worked for a short time before going on disability. TR 2806, 2807.

incinerator's emissions had been tested and it met all the requirements of the state of Tennessee and the Federal government. Mr. Conner stated that this information was public knowledge. TR 2811, 2812.

Mr. Conner admitted that he was aware of an article in the company newspaper concerning "squeaking wheels." He stated that the statement was unfortunate and did not come from him and was not intended to be representative of the work being done on the health concerns. Mr. Conner stated that in every conversation he had with employees he would reiterate that they had the right to come to management with their health and safety concerns and were expected to do so. He added that the cyanide working group program reflected the views and policies of senior management. Mr. Conner admitted that he was aware that Sandra Reid, a non-employee member of the cyanide working group who served on the Site Specific Advisory Board, commented that she thought that workers were ignored. Mr. Conner stated that he did not agree with Ms. Reid's statement. He added that he did recall that in a working group meeting, Ms. Reid expressed concern about the tenor of some of Mr. Milan's comments stating that she did not feel that they were positive to the group.⁵⁴ He stated that he told Ms. Reid that the group was formed to make progress and that he intended it to do so. Mr. Conner testified that if an unacceptable level of cyanide was found the site would be shut down immediately and any employee exposed would be treated. Mr. Conner stated that the company had never sought to layoff any employee who expressed concerns. He added that although there have been extensive layoffs in the past two years at LMES none of the employees who complained about cyanide were deliberately included. TR 2812-2815, 2886, 2887.

Mr. Conner testified that it did come to his attention that both Mr. and Mrs. Cox received layoff notices at about the same time. Mr. Conner stated that he knew Mrs. Cox was RIFed, but learned of Mr. Cox's RIF from Fred Mynatt. Mr. Conner stated that the layoffs of the Coxes were done according to protocol after careful review of many factors and no steps were taken to halt their layoffs. Mr. Conner testified that he did not recall having a conversation with Brenda Tilley regarding the Coxes' layoff. He added that he did have a conversation with Mrs. Cox and ultimately received a letter from her concerning her thoughts on the layoff. Mr. Conner testified that he did not send a written response, but communicated to her later that she had been RIFed properly. Mr. Conner stated that he first became aware of Mrs. Cox's concerns in the meeting of the cyanide working group. He testified that he did not know of any involvement on the part of Mr. Cox in any group. Mr. Conner admitted that he and Linda Cox were both on television in June 1996. He acknowledged that he had seen Mrs. Cox's interview on the news, but he had never heard a manager say anything to the effect that she was a television star. He added that managers had mentioned seeing both parties on the telecast. TR 2826-2828, 2859, 2882-2885.

Mr. Conner testified that he agreed with the findings of the NIOSH report and the governor's panel that there was no cyanide problem at K-25. He recalled that the University of Alabama report confirmed that the methodology for measuring cyanide was appropriate, but found procedural problems. Mr. Conner testified that he did not recall the report charging that there were constraints on the contractor organization at K-25. In reviewing the report, Mr. Conner admitted that it included

⁵⁴Mr. Milan was part of the working group. TR 2887.

the statement “constraints on their effective participation in non-traditional investigations by such organizational factors as the chargeback system, restricted methodology, and current mandatory workloads.” Mr. Conner stated that the “chargeback system” refers to the fact that each organization working onsite has a service rate and the industrial hygiene technicians who did the sampling were charging that rate. Mr. Conner testified that the methodology restrictions maintained must relate to the capability of the industrial hygiene group to perform the protocol for analyzing certain compounds such as hydrogen cyanide. TR 2845-2850; RX-27.

Mr. Conner admitted that the month after the NIOSH close out meeting, concerned employees of K-25 held the first public environmental health meeting convened by workers in Oak Ridge. Mr. Conner testified that he did not attend the meeting and knew of it only through the newspaper articles he reviewed for his appearance in court. TR 2880.

Mr. Conner testified that he had never told managers not to answer questions from the *Tennessean*. He added that he had told his managers to be open and honest in answering questions from the newspapers. TR 2890.

David Milan

David Milan, LMES director for all three LMES sites, testified that he had worked for LMES for 20 years. Mr. Milan stated that in 1995-1996 he was the safety and health director for LMES. Mr. Milan testified that he became aware that employees were expressing concern about exposure to cyanide in October 1995 when he was asked to provide some guidance to the safety and health director at K-25 for obtaining samples in certain areas. He added that the company had a routine sampling program for various toxins that was ongoing. Mr. Milan testified that there were 1,300 air samples taken for cyanide and additional samples for other toxins after October 1995. He explained that the threshold limit value is a term used by the American Conference of Governmental Industrial Hygienists to refer to the eight hour limit for workplace exposure. He added that the permissible exposure limit is the term used by the Occupational Safety and Health Administration (OSHA) that monitor industrial exposure. Mr. Milan testified that samples taken by a detector tube and a sampling pump found nondetectable levels of cyanide which meant that the levels could not be detected by the analytical methods and the instrumentation used which can measure .01 micrograms. He stated that the permissible exposure limit for cyanide in the workplace is 5 milligrams per cubic meter. Mr. Milan testified that the OSHA permissible exposure limit is approximately 11 milligrams per cubic meter. Mr. Milan stated that the testing showed levels 5 to 10 thousand below the most conservative limit established for cyanide. TR 2902-2907.

Mr. Milan testified that he had met the employees expressing cyanide concerns when he participated in two of the working group meetings. He explained that the members of the group varied from meeting to meeting, but he recalled Dr. Oesch; Sherrie Farver; industrial hygiene professionals Ted Helms, Dristen Baksa, Charlie Satterwhite and Harold Conner participating in the meetings. Mr. Milan stated that he did not meet personally with Ms. Farver or Ms. Orick or any of those expressing concerns, but knew that Mr. Conner and Larry Perkins, head of the safety and health organization at K-25, spoke with them. He was aware that the initial test results were provided to

two of the employees personally and that the results of the testing were discussed at meetings. Mr. Milan testified that there was some concern about the test results and some disagreement about the protocol used, but the University of Alabama reviewed and approved it. TR 2908-2910.

Mr. Milan testified that he was aware that employees requested the NIOSH evaluation and that LMES assisted in coordinating the investigation and making sure that NIOSH went to the right places at the site and interviewed the correct individuals. He stated that the results were announced in a close out session which was an open forum. Mr. Milan testified that other managers from the company were present including Dr. Fred Mynatt, senior vice president, Mr. Conner, and Dr. Conrad. Mr. Milan stated that there were employees concerned with the cyanide issue present and some of their comments indicated disagreement with NIOSH'S conclusions. Mr. Milan admitted that he could not recall a sign-in sheet for that meeting and was not able to locate one. Mr. Milan testified that NIOSH declined to expand the scope of the evaluation beyond cyanide. TR 2911-2913, 2915.

Mr. Milan admitted that he recalled Sandra Reid exhibiting a particular interest in the research group. Mr. Milan admitted that Ms. Reid thought that management was not concerned about the employees. He added that the members of management in the working group tried to impress upon Ms. Reid that they were concerned about the employees. TR 2913-2914.

Mr. Milan testified that his office handled the contract with Dr. Lockey and Dr. Byrd to perform the evaluations at K-25. He stated that the scope of the work was to find out what was the problem, and, if there were any conditions, activities or processes at the site which should be changed to benefit the employees, then the doctors should notify management. Mr. Milan testified that there was no report from Drs. Lockey or Byrd at present, but that the time period for reporting had been left to their discretion. TR 2914.

Mr. Milan testified that he was acquainted with Mrs. Cox, but did not work with her in any of the cyanide group meetings. He stated that he had worked with Ms. Walzer in the cyanide working group. He admitted that Ms. Walzer disagreed with the results of the LMES's testing. Mr. Milan testified that he believed that Ms. Walzer felt that levels of cyanide too low to be detected were causing employee illnesses. Mr. Milan admitted that, as a certified professional industrial hygienist, he disagreed with some of the things Ms. Walzer was saying because he felt confident in the abilities of the individuals doing the evaluation and, consequently, confident in their results. Mr. Milan admitted that cyanide has been used at the plant for five decades. TR 2917-2919, 2929.

Other Evidence

CX-175B

CX-175B, p. 2 reflects an interview with Mrs. Cox on WBIR 6:00 PM news. This interview was aired on June 4, 1996.

CX-127A

CX-127A, p. 1, the layoff comparison form used for the RIF, indicates that the candidates for RIF were all under 50 years of age whereas the administrative captains not included were over 50. The exhibit establishes that although Mr. Cox had the longest tenure as an employee, he had the shortest tenure as an administrative captain.

CX-115

CX-115, the layoff comparison form including Mrs. Cox, reflects that Mrs. Cox had a shorter tenure with LMES and lower performance ratings than did the other layoff candidate Mr. Bolton.

Discussion and Conclusions of Law

Under the ERA's employee protection:

(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or person acting pursuant to a request of the employee)--

(A) notified his employer of an alleged violation of this chapter or the Atomic Energy Act of 1954 (42 U.S.C. 2011 et seq.);

(B) refused to engage in any practice made unlawful by this chapter or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;

(C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this chapter or the Atomic Energy Act of 1954;

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;

(E) testified or is about to testify in any such proceeding or;

(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this

chapter or the Atomic Energy Act of 1954, as amended.

42 U.S.C. 5851(a)(1988).

To establish a prima facie case of retaliatory discharge under the whistleblower provision invoked here, a complainant must show that: (1) the complainant engaged in protected activity; (2) the employer was aware of that protected activity; and (3) the employer took some adverse action against the complainant. The complainant must present evidence sufficient to raise the inference that the protected activity was the likely reason for the adverse action. Dartey v. Zack Co. of Chicago, 82-ERA-2 (1983). The presence or absence of a retaliatory motive is provable by circumstantial evidence even if witnesses testify that they did not perceive such a motive. See Ellis Fischel State Cancer Hosp. v. Marshall, 629 F.2d 563, 566(8th Cir. 1980), cert. denied, 450 U.S. 1040(1981). Circumstantial evidence may raise the inference that a protected activity was the likely reason for an adverse action. Schweiss v. Chrysler Motor Corp., 987 F.2d 548, 549(8th Cir. 1993).

If the employee establishes a prima facie case, the employer has the burden of producing evidence to rebut the presumption of disparate treatment by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons. The employer bears only a burden of producing evidence at this point. The ultimate burden of persuasion remains with the employee. If the employer rebuts successfully the prima facie case, the employee still has the opportunity to prove that the proffered reason was not the real reason for the employment decision. The employee may succeed by persuading the Court that a discriminatory reason more likely motivated the employer or by showing indirectly that the employer's proffered explanation is unworthy of credence. The trier of fact may then conclude that the employer's proffered reason for its conduct is a pretext and rule that the employee had proved actionable retaliation for protected activity. However, the trier of fact may conclude that the employer was not motivated, in whole or in part, by the employee's protected conduct and rule that the employee has failed to establish his case by a preponderance of the evidence. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248(1981).

Protected Activity

To determine if there was a retaliatory discharge under the environmental whistleblower laws the seminal issue is whether or not the complainant engaged in protected activity. Only if the activity is deemed to be protected are the other elements of a prima facie case addressed.

To establish protected activity, the employee need demonstrate only a reasonably perceived violation of the underlying statute or its regulations. Abu-Hjeli v. Potomac Power Co., 89-WPC-1 (1993); see also Johnson v. Old Dominion Security, 86-CAA-3,4, 5 (1991). It has been held, however, that once an employer investigates a complainant's safety concerns and demonstrates to him or her that there is no possible violation of the statute, the complainant's activity is no longer protected. Wilson v. Bechtel Construction, Inc., 86-ERA-34 (1988). Additionally, in Kesterson v. Y-12 Nuclear Weapons Plant, 95-CAA-12 (ARB Apr. 8, 1997), the Board noted that the employee

protection provisions provide protection for making safety and health complaints grounded in conditions constituting reasonably perceived violations of the environmental laws, but not for an employee's mere subjective belief that the environment might be affected. In Decresci v. Lukens Steel Co., 87-ERA-13 (Sec'y Dec. 16, 1993), the complainant's allegations were not related to nuclear or radiation safety. The judge concluded that because the respondent was licensed by the NRC, all of its employment actions were covered by the ERA's whistleblower provision. The Secretary rejected this interpretation, holding that complainant's safety-related activity must relate to nuclear safety to be protected under 42 U.S.C. § 5851. Citing by analogy, Aurich v. Consolidated Edison Co. Of New York, Inc., 86-CAA-2 (Sec'y Apr. 23, 1987) (handling of asbestos in workplace; CAA only covers release of asbestos into surrounding air, not as an occupational hazard); Ellison v. Merit Systems Protection Board, No. 92-3057, 1993 U.S. App. LEXIS 27786 (D.C. Cir. Oct. 26, 1993) (Whistleblower Protection Act complaint must be linked to type of fraud, waste or abuse that WPA was intended to reach).

Complainants assert that they engaged in protected activity under the Energy Reorganization Act (ERA). Their assertions do not withstand scrutiny. Complainants' allegations that they were the victims of cyanide intoxication related to an occupational exposure at K-25 are not related to nuclear safety and are therefore not protected under the ERA. Thus, this Court concludes that Complainants were not engaging in protected activity within the meaning of the ERA when they expressed their concerns and, accordingly, have not established a prima facie case of discrimination under that Act.

Additionally, even if the allegations were determined to fall under the Energy Reorganization Act, Complainants' belief that they were harmed by an occupational source of cyanide is unreasonable. The record here indicates Respondent addressed Complainants' concerns on numerous occasions. Over 1300 air samples for cyanide were taken by the industrial hygiene department at K-25 from October 1995 to May 1996. The results established that cyanide levels at the site were under the permissible exposure limits defined by the Occupational Safety and Health Administration. The data was subsequently reviewed by the University of Alabama with the finding that the protocol was appropriate. In addition, when employees (including Complainants) requested that the National Institute of Occupational Safety and Health (NIOSH) investigate the cyanide issue, the tests performed by NIOSH confirmed the results of the earlier testing. Finally, the Governor of Tennessee appointed a panel of experts to visit K-25 and evaluate the cyanide issue. Based on overwhelming evidence that there was no occupational source for cyanide exposure, this Court finds that it was not objectively reasonable for Complainants to perceive that their illnesses were caused by occupational exposure at K-25.

In finding that the Complainants perceptions were unreasonable, this Court holds that they did not engage in protected activity and, therefore, have not met the first element of establishing a prima facie case under the Act. As Complainants have not met the first element of a prima facie case, it is unnecessary to address the additional elements.

Dual Motive

Complainants assert that their actions should be analyzed using the dual motive criteria.

Although this Court has found that there was no protected activity, the dual motive issue will be addressed.

The dual motive test requires that when both discriminatory and non-discriminatory reasons for the adverse employment action have been presented, the respondent must demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of protected activity. Mount Healthy School Dist. V. Doyle, 429 U.S. 274 (1977); Sysert v. Florida Power Corp., 93-ERA-21 (Sec’y April 25, 1995); Dartey v. Zack Co. Of Chicago, 82-ERA-2 at 6-9 (Sec’y April 25, 1983). The Comprehensive National Energy Policy Act of 1992 raised the burden of proof for the respondent in a dual motives analysis in an ERA whistleblower case from a preponderance of the evidence to clear and convincing evidence. 45 U.S.C. § 5851 (b)(3)(D); Yule v. Burns Int’l Security Serv., 93-ERA-12 Sec’y May 24, 1995). However, the Secretary determined that the initial burden of establishing a prima facie case was unchanged by the 1992 amendments. The Secretary also held that the “clear and convincing standard” is reached only if the dual or mixed motive doctrine is invoked. Remusat v. Bartlett, Inc., 94-ERA-36 (Sec’y Feb. 26, 1996).

In the instant case, because Complainants have failed to meet their initial burden of establishing a prima facie case the dual motive issue is moot. However, this Court finds that, even if Complainants had met their burden of establishing a prima facie case, a dual motive analysis is not required as Complainants have not met the threshold for the application of the test by exhibiting a discriminatory purpose for the adverse personnel actions.

Complainants assert that their layoffs were due to retaliation for addressing cyanide concerns to the company, to NIOSH, and to the media. However, this Court finds that the terminations of both Mr. Cox and Mrs. Cox were based purely on budgetary restrictions for the 1997 fiscal year which mandated a reduction in personnel, and not on retaliation for alleged protected activity.

Mrs. Cox asserts that her selection for termination was not made until her selection was reviewed by Mack Wilson, vice president of Human Resources, and the legal department on August 9, 1996. However, this court finds that there is substantial and credible evidence that the decision to layoff Mrs. Cox was made February 23, 1996. The fact that Mrs. Cox was not apprised of her termination until August is in accordance with company policy not to inform employees until the layoff is imminent because there are occasions when budgetary constraints may be lifted and the reduction order vacated. There is no evidence that anyone involved in Mrs. Cox’s selection for RIF had knowledge of any activity by her related to the cyanide issue at that time. Furthermore, Mrs. Cox’s contention that her RIF was not final until it was reviewed by the internal review boards and the company’s legal division does not contravert the fact that she was selected for RIF February 23, 1996. This court finds no weight in the “semantic” argument that recommendation does not comport with selection. Credible testimony established that within the RIF process the initial selections by immediate managers were not overturned unless there was evidence of some form of discrimination in the selection process. This evidence supports Respondent’s contention that the date of Mrs. Cox’s selection should be determined to be February 23, 1996. In addition, the selection of Mrs. Cox was made based on reasonable and well established company criteria, the

same criteria that was used plant wide. The two possible candidates for reduction were Mrs. Cox, a level 3 facility specialist, with 19 years of company service and Mr. Bolton, a level 6 facility specialist, with 21 years of company service. Mrs. Cox's position supervised change buildings and a few maintenance shops. In contrast, Mr. Bolton had responsibility for a large machine maintenance building housing sheet metal, machine, carpenter, and weld shops which included wide ranging responsibility for machinery, heating and ventilation systems. Ultimately, Mr. Bolton was retained over Mrs. Cox because of the length of his company service and the complexity of his job. Therefore, the evidence supports the termination of Mrs. Cox as a reasonable, business decision in accord with established company policy.

Mrs. Cox contends also that the manner in which her notice of termination was handled violated company policy. However, this Court finds that the evidence contradicts that contention. It appears that Mrs. Cox misinterpreted the policy as providing that one could not be notified of a termination while on disability leave. The established policy actually provides that an employee on disability be informed of his termination, but the termination is effected only after his being released to return to work. Therefore, Respondent followed established procedure in notifying Mrs. Cox that she was being RIFed.

There is no credible evidence that Mr. Cox's layoff was due to alleged protected activity. The decision to eliminate his position, procedure writer, was made by his immediate managers August 13, 1996. There is no evidence to support Mr. Cox's contention that at that time either manager had knowledge of his alleged protected activity. The record establishes that the individuals who prepared the final RIF list, Mr. White and Mr. Clements, had no knowledge of any alleged protected activity. In addition, the choice of Mr. Cox for termination was made according to a process consistent with other reductions in force. Mr. Cox was terminated because it was determined that a procedure writer, the position held by Mr. Cox, was less essential than that of shift commander, operations officer, vehicle and maintenance officer or armorer.

Complainants contend that they both were "positioned" for a reduction. The evidence controverts Complainants' contention. In July 1993, Mrs. Cox was promoted to laundry supervisor. The decision to contract out the laundry was made in 1994. Then, in early 1995 when the laundry was closed, Mrs. Cox was transferred to a building specialist's position in lieu of termination. This is the position held by Mrs. Cox when the RIF was instituted.

In October 1993 protective services was centralized and Mr. Cox was transferred to the Y-12 plant as an administrative captain. Then, in May 1996 Mr. Cox was transferred back to K-25 as part of a reorganization that reassigned several personnel from the central organization back to their respective sites. This Court finds that these facts support Respondent's contention that the transfers of Complainants were in the normal course of business and not meant to position them for a RIF. Additionally, neither of the prior positions occupied by Complainants were filled by replacements.

Under the facts presented here, there is no evidence that a discriminatory purpose was present in the decision to terminate either Complainant or the positions they occupied. There is, in

fact, no credible evidence that the alleged protected activity was even a contributing factor in the selection of the Complainants for termination. Therefore, because no discriminatory intent exists, this is not a dual motive situation. Furthermore, even if a dual motive existed, this Court finds that the Respondent has met its burden of showing by clear and convincing evidence that the alleged protected activity was not a contributing factor in the selection of either Complainant for termination.

Prima Facie Case

In Hu v. Public Service Electric & Gas Co., 93-ERA-38 (ALJ Dec. 8, 1993), the judge citing St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742, 2747 (1993), declined to address the issue of whether complainant had established a prima facie case of discrimination because he was "convinced that [complainant] had not sustained his ultimate burden of proving, by a preponderance of the evidence, that respondent intentionally discriminated against him because he engaged in protected activities." Slip op. At 9. Specifically, the court found that respondent had "produced convincing evidence that all the adverse employment actions that [complainant] complains of were for legitimate business reasons[.]" and that there is "no evidence of pretext or dual motive" and that complainant had "not sustained his ultimate burden of proving that his allegedly protected activity motivated, whole or in part, [respondent's] decision to any of the adverse employment actions he experienced." Slip op. at 9 and 12.

Assuming, *arguendo*, that Complainants met their burden of establishing a prima facie case, they could not meet their ultimate burden of proving that their termination was due, even in part, to protected activity. The legitimate, nondiscriminatory reason for the discharges that Respondent asserts is budget decreases which impacted the entire organization, and, which resulted in mandatory reductions in personnel.

Nondiscriminatory Purpose

In Shusterman v. Ebasco Servs. Inc., 87-ERA-27 (Sec'y Jan. 6, 1992), the employer established that its reasons for a reduction in force were legitimate where complainant's supervisor, who was found to be credible by the administrative law judge, testified that the RIF was occasioned by lack of billable contract work creating a financial drain on the employer. Employer also established that it conducted the RIF in a nondiscriminatory fashion through the testimony of complainant's supervisor which established that four employees were RIFed at the same time, there was no suggestion that the other three employees were also targets of retaliation or that their selection for discharge was in any way improper, and a low performance rating given to complainant was based on a reasonable ratings system.

In the instant case, Respondent has presented credible testimonial and documentary evidence to support its position that the Coxes were RIFed due to budgetary constraints. For the fiscal year 1997, K-25 had a proposed twenty-five percent reduction in budgetary income and reductions were made to have the least impact on the service provided by LMES to its customers. The process first identified positions to be reduced with those involving administrative functions, which do not

directly support customers, reduced fifty-percent. Furthermore, the fact that no one was transferred or hired to perform the duties of either of the Coxes after they were terminated substantiates the legitimacy of their terminations.

Another issue raised by Complainants was the disallowance of “bumping” back to a lower position. This issue was credibly resolved by testimonial evidence that Respondent did not allow bumping in the salaried positions such as those held by Complainants.

The Coxes’ termination was determined by the implementation of a longstanding multiphasic process, commencing with selection by their immediate managers, that applied to all potential candidates. There is no evidence that the process was used in a discriminatory manner. The determination of a nondiscriminatory purpose along with the lack of any discriminatory motive leads this Court to the conclusion that the termination of the Complainants was both reasonable and legitimate.

In summary, this Court finds that Complainants have not established a prima facie case and, accordingly, have not met their threshold burden establishing a violation of the employee protection provisions of the Energy Reorganization Act.

Post-Hearing Motions

Complainants’ Motion of October 15, 1998

Complainants’ October 15, 1998 Motion to Supplement the Record is DENIED as it was offered late and without good cause.

Complainants’ Motion of October 21, 1998

Complainants’ October 21, 1998 Motion for a Default Judgment and Motion to Shorten Time is DENIED as being without merit.

Complainants’ Motion of November 2, 1998

Complainants’ November 2, 1998 Motion for Leave of Court to File a Reply to Lockheed Reply and Motion for Hearing on Lockheed’s Evidence Withholding is DENIED as being without merit.

Although the aforementioned motions have been DENIED, this Court finds that even if they had been granted, the findings made in this order would not be altered.

RECOMMENDED ORDER

It is, therefore, ORDERED, ADJUDGED and DECREED that the complaint of Delbert Lynn Cox and Linda Jayne Cox is hereby DISMISSED.

JAMES W. KERR, JR.
Administrative Law Judge

JWK/cmh

NOTICE: This Recommended Decision and Order and the administrative file in this matter will be forwarded for final decision to the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. See 61 Fed. Reg. 19978 and 19982(1996).